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PREFACE

TO THE SEVENTH EDITION.

THIS Work was originally put forward simply as a Students' Manual—*always remembering that a person does not cease to be a student merely because he is called to the Bar, or admitted a Solicitor.*

The learned Author, in his preface to the first edition, stated that his object was to bring together and to elucidate the 150 cases of most general importance in the Common Law.

The unusual *style* in which the book was written was adopted as likely to arrest the attention, aid the memory, and make the study of the law less dry and repulsive. "Moreover," said the Author, "now and then, in the stating of a case, certain deviations from strict accuracy may be discovered. For instance, I have treated nearly every case as if at *nisi prius;* deeming it undesirable to confuse the student, and withdraw his attention from the true point and effect of the decision by appeals, rules for new trials, &c."

When the present Editor undertook the task of preparing the fourth edition, he endeavoured by a

considerable modification of the style originally adopted by the Author, by a re-arrangement and some alterations of the leading cases, and by revising and in many cases re-writing the notes, and making a large addition to the cases cited as illustrating the text, *to increase the utility of the work as a book of reference for practitioners, without rendering it less acceptable to the law student.* That this course has been fully approved seems evident from the constant increase in the demand for the book, a fifth and sixth edition having been exhausted within a short time.

The Editor has again carefully revised the work, re-writing some of the notes, and making such alterations and additions to the cases as seemed necessary or advisable.

All cases of importance down to November, 1903, bearing upon the subjects dealt with are, it is believed, now included in the text, or referred to in the notes.

RICHARD WATSON.

12, Piccadilly, Bradford.
December, 1903.

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CONTRACTS.

Formation of Contracts.

OFFER AND ACCEPTANCE.

Proposal may be retracted before Acceptance.

COOKE *v.* OXLEY. (1790) [1]

[3 T. R. 653; 1 R. R. 783.]

Oxley having a quantity of tobacco on hand proposed to Cooke to sell him 266 hogsheads of it. Cooke asked to be allowed till four o'clock to decide; and Oxley consented to this. But after Cooke had gone away to think it over, Oxley altered his mind, and resolved not to let Cooke have his tobacco.

This was an action by Cooke for non-delivery of the tobacco: but he did not succeed, because it was held that, as there was no consideration for Oxley's promise to keep his offer open, he could retract it with impunity at any time before Cooke announced his assent to it (*a*).

(*a*) Although this case has been freely criticised by eminent authors in America, the soundness of the principle it has established cannot now be questioned in this country. The point raised is discussed in Benjamin on Sale, p. 69 (4th ed.). The action was not on the promise to keep the offer open, but for the non-delivery of goods as upon a complete bargain and sale; and the declaration was held insufficient because it did not allege that the defendant had actually left the offer open for acceptance as he had promised. But see Pollock on Contracts, p. 26 (*e*) (7th ed.). The case, however, must not be read as supporting the view that a tacit revocation is sufficient.

Consideration for proposal.

It is to be observed that if Cooke had given Oxley sixpence for keeping the offer open, or if he had agreed to pay a higher price for the tobacco in consequence, there would have been a consideration for Oxley's promise, and he would have been bound by it. The case was followed in Routledge *v.* Grant (*b*) (where it was held that defendant having offered to buy a house in St. James's Street, and to give plaintiff six weeks for a definite answer, he might at any time during the six weeks, and before it was accepted, withdraw his offer), and it may be taken to be clear law that *a mere proposal may be revoked at any time before acceptance.* If, however, the offer is made under seal it cannot be revoked; even though uncommunicated to the person to whom it is intended to be made, it remains open for acceptance when he becomes aware of it, but if the promisee then refuses his assent the contract is avoided (*c*). It is on this principle that at an auction a bidding can be retracted any time before the hammer goes down (*d*). Till then there has been no acceptance of the bidder's proposal. An auctioneer who advertises the sale of certain goods does not by that advertisement alone enter into any contract or warranty with those who attend the sale that the goods shall be actually sold (*e*). But where a sale is advertised as *without reserve*, and a lot is put up and bid for, there is a binding contract between the auctioneer and the highest bidder that the goods shall be knocked down to him (*f*).

Biddings at auctions.

Auction sales are now governed by sect. 58 of the Sale of Goods Act, 1893 (*g*), which provides as follows:—

"(1) Where goods are put up for sale by auction in lots, each lot is *primâ facie* deemed to be the subject of a separate contract of sale:

(2) A sale by auction is complete when the auctioneer announces its completion by the fall of the hammer, or in other customary manner. Until such announcement is made any bidder may retract his bid:

(3) Where a sale by auction is not notified to be subject to a right to bid on behalf of the seller, it shall not be lawful

(*b*) (1828), 4 Bing. 653; 6 L. J. C. P. 166. See also Bristol Aërated Bread Co. *v.* Maggs (1890), 44 Ch. D. 616; 59 L. J. Ch. 472.

(*c*) Xenos *v.* Wickham (1866), L. R. 2 H. L. 296; 36 L. J. C. P. 313.

(*d*) Payne *v.* Cave (1789), 3 T. R. 148; 1 R. R. 679; and see Warlow *v.* Harrison (1858), 1 E. & E. 295; 28 L. J. Q. B. 18; 29 L. J. Q. B. 141. See also the recent case of Van Praagh *v.* Everidge, [1903] 1 Ch. 434; 72 L. J. Ch. 260; which was the case of a person bidding for one lot in mistake for another.

(*e*) Harris *v.* Nickerson (1873), L. R. 8 Q. B. 286; 42 L. J. Q. B. 171.

(*f*) Warlow *v.* Harrison, *supra*.

(*g*) 56 & 57 Vict. c. 71.

for the seller to bid himself or to employ any person to bid at such sale, or for the auctioneer knowingly to take any bid from the seller or any such person. Any sale contravening this rule may be treated as fraudulent by the buyer:

(4) A sale by auction may be notified to be subject to a reserved or upset price, and a right to bid may also be reserved expressly by or on behalf of the seller.

Where a right to bid is expressly reserved, but not otherwise, the seller, or any one person on his behalf, may bid at the auction."

What amounts to an "offer."

A mere declaration of intention, and a mere invitation for offers, must be distinguished from the offer or proposal which is the first step in the formation of a contract. An excellent illustration of this distinction is offered by Spencer *v.* Harding (*h*). In that case the defendants sent out a circular as follows: "We are instructed to offer to the wholesale trade for sale by tender the stock in trade of" A., amounting to so-and-so, "and which will be sold at a discount in one lot. Payment to be made in cash." It was held that this did not amount to a contract or promise to sell to the person who made the highest tender, but was, to use Mr. Justice Willes' words, "a mere proclamation that the defendants are ready to chaffer for the sale of the goods, and to receive offers for the purchase of them." This case was recently followed in Rooke *v.* Dawson (*i*), where it was held that an announcement that an examination for a scholarship would be held did not imply a condition that the scholarship would be given to the competitor obtaining most marks; and consequently that there was no contract on which such competitor could sue the trustees of the scholarship. The revocation of a proposal, however, to be effective, *must be communicated to the other party before acceptance;* but it is not necessary that there should be an actual and express withdrawal of the offer, or what is called a retractation; for knowledge in point of fact of the proposer's changed intention, however ascertained by the other party, will make the proposer's conduct a sufficient revocation (*k*). An offer of a contract sent by letter cannot be withdrawn by merely posting a subsequent letter which does not, in the ordinary course of the post, arrive until after the first letter has been received and answered (*l*). In such a case *the con-*

Contract by letter.

(*h*) (1870), L. R. 5 C. P. 561; 39 L. J. C. P. 332; and see Montreal Gas Co. *v.* Vasey, [1900] A. C. 595; 69 L. J. P. C. 134.

(*i*) [1895] 1 Ch. 480; 64 L. J. Ch. 301.

(*k*) Dickinson *v.* Dodds (1876), 2 Ch. D. 463; 45 L. J. Ch. 777.

(*l*) Byrne *v.* Van Tienhoven (1880), 5 C. P. D. 344; 49 L. J. C. P. 316; and Stevenson *v.* McLean (1880), 5 Q. B. D. 346; 49 L. J. Q. B. 701.

Henthorn v. Fraser.

tract is complete the moment the letter accepting the offer is posted, even though it never reaches its destination (*m*). The case of Henthorn *v.* Fraser (*n*) is a very good illustration of the law applicable to the formation of contracts by letters sent through the post. H., who lived at Birkenhead, called at the office of a land society in Liverpool, to negotiate for the purchase of some houses belonging to them, and the secretary signed and handed to him a note giving him the option of purchase for fourteen days at 750*l*. On the next day the secretary posted to H., between twelve and one o'clock, a withdrawal of the offer, which reached Birkenhead at 5 p.m. In the meantime H. had, at 3.50 p.m., posted to the secretary an unconditional acceptance of the offer, which was delivered in Liverpool at 8.30 p.m., after the society's office had closed, and was opened by the secretary on the following morning. It was held that a binding contract was made on the posting of H.'s acceptance, that the revocation of the offer was too late, and that H. was entitled to specific performance; and the rules of law governing the case were stated to be: (1) That where the circumstances under which an offer is made are such that it must have been within the contemplation of the parties that, according to the ordinary usages of mankind, the post might be used as a means of communicating the acceptance of it, the acceptance is complete as soon as it is posted; (2) That in the present case, as the parties lived in different towns, an acceptance by post must have been within their contemplation, although the offer was not made by post; (3) That a revocation of an offer is of no effect until brought to the mind of the person to whom the offer was made, and that therefore a revocation sent by post does not operate from the time of posting it. The rule that the revocation of an offer must be received before the letter of acceptance is posted has been based upon different grounds, viz., (α) that the post office is the common agent of both parties (*o*), or (β) that by general usage, the relation between the parties, or the terms of the offer, an acceptance through the post has been contemplated. It may also be supported on the ground of convenience. It may here be pointed out that when a contract is

(*m*) Dunlop *v.* Higgins (1848), 1 H. L. 381; 12 Jur. 295; Household Fire Insurance Co. *v.* Grant (1879), 4 Ex. Div. 216; 48 L. J. Ex. 577.

(*n*) [1892] 2 Ch. 27; 61 L. J. Ch. 373; and see *In re* London and Northern Bank, *Ex parte* Jones, [1900] 1 Ch. 220; 69 L. J. Ch. 24; where it was held that a town postman is not an agent of the Post Office to receive letters, and, consequently, the delivery to him of a letter of acceptance of an application of allotment of shares will not, for the purpose of fixing the time of the acceptance, be regarded by the Court as a posting of the letter.

(*o*) But see per Kay, L. J., in Henthorn *v.* Fraser, *supra*.

composed of an offer by letter and an acceptance of the offer by letter, if the offer is clear and unambiguous, and the party who answers it wishes to add to it any condition or qualification, the onus rests upon him of stating clearly and precisely what that condition or qualification is; for if the answer, though ambiguous, is capable of being construed as an acceptance pure and simple of the offer, the party making the offer is justified in acting upon it in that sense (*p*). An offer by telegram is presumptive evidence that a prompt reply is expected, and an acceptance by letter may be evidence of such unreasonable delay as to justify a withdrawal of the offer (*q*). A proposer may not prescribe a time or form of refusal so as to bind the other party if he does not refuse in the specified time or form (*r*). If no time is limited for acceptance, it must be communicated within a reasonable time (*s*). The death of the proposer before acceptance effects a revocation of the offer, although unknown to the other party.

An offer need not be made to an ascertained person, but no contract can arise until it has been accepted by a definite person; thus, an action can be maintained for a reward offered in an advertisement by any person who, though unaware of the reward (*t*), has fulfilled the conditions therein prescribed. The leading case on the subject is Williams *v.* Carwardine (*u*), where the defendant had caused a handbill to be published to the effect that whoever would give such information as should lead to the discovery and conviction of the murderer of one Walter Carwardine should receive a reward of 20*l*. In an action by a woman against the person who

Offers by advertisement.

(*p*) See English and Foreign Credit Co. *v.* Arduin (1871), L. R. 5 H. L. 64; 40 L. J. Ex. 108.

(*q*) Quenerduaine *v.* Cole (1883), 32 W. R. 185.

(*r*) Felthouse *v.* Bindley (1862), 31 L. J. C. P. 204; 11 C. B. N. S. 869.

(*s*) Ramsgate Hotel Co. *v.* Montefiore (1866), L. R. 1 Ex. 109; 35 L. J. Ex. 90.

(*t*) Gibbons *v.* Procter (1891), 64 L. T. 594; 55 J. P. 616. It is difficult, however, to reconcile this decision with the ordinary principles governing the formation of contracts. See Anson on the Law of Contract, p. 19 (9th ed.).

(*u*) (1833), 4 B. & Ad. 621; 2 L. J. (N. S.) K. B. 101. See also Denton *v.* G. N. Ry. Co., *post*, p. 320. As to the person entitled to the reward, see Thatcher *v.* England (1846), 3 C. B. 254; 15 L. J. C. P. 241; Gibbons *v.* Procter, *supra*. As to what services are sufficient to earn the reward, see Tarner *v.* Walker (1867), L. R. 2 Q. B. 301; 36 L. J. Q. B. 112; Fallick *v.* Barber (1813), 1 M. & S. 108; Bent *v.* Wakefield Bank (1878), 4 C. P. D. 1; 39 L. T. 576; Lancaster *v.* Walsh (1838), 4 M. & W. 16; 1 H. & H. 258; Smith *v.* Moore (1845), 1 C. B. 438; 9 Jur. 352; and when the informant is a policeman, England *v.* Davidson (1840), 11 A. & E. 856; 4 Jur. 1032; Neville *v.* Kelly (1862), 32 L. J. C. P. 118; 12 C. B. N. S. 740; and Lockhart *v.* Barnard (1845), 14 M. & W. 674; 15 L. J. Ex. 1. See also Lancaster *v.* Walsh, *supra*.

had offered the reward, it was held that she was entitled to succeed, although the jury expressly found that she had not been induced to give the information by the offer of the reward, but by other motives. "There was a contract," said Parke, J., "with any person who performed the condition mentioned in the advertisement." In Carlill *v.* Carbolic Smoke Ball Co. (*x*), the defendants advertised that they would pay 100*l.* reward to any person who contracted influenza after having used their "Carbolic Smoke Ball" according to the printed directions supplied. The plaintiff, on the faith of this advertisement, purchased from a chemist one of the defendants' "Smoke Balls," and used it according to the directions, but nevertheless contracted influenza, and accordingly claimed the 100*l.* The Court held that the advertisement was an offer to contract, which by the performance of the conditions therein contained, the plaintiff had accepted, and that, having regard to the character of the transaction, no notification of acceptance of the offer was necessary, and consequently there was a binding contract by the defendants to pay the 100*l.* The case of *In re* Agra and Masterman's Bank (*y*) is a good illustration of a definite acceptance of a general offer addressed to an indefinite and unascertained body of persons; and so, too, is the case of the acceptance of the continuing offer made by the owner of an automatic distributing machine by a person who puts in a coin to obtain some article contained in the machine.

The "Smoke Ball" case.

Automatic machines.

Importance of Mutuality.

[2] **JORDAN *v.* NORTON.** (1838)

[4 M. & W. 161; 7 L. J. Ex. 281.]

Norton wrote to Jordan offering to buy a mare if the latter would warrant her "*sound and quiet in harness.*" Jordan wrote back warranting her "*sound and quiet in double harness,*" but saying he had never put her in *single* harness. The mare was taken to Norton's, and then

(*x*) [1893] 1 Q. B. 256; 62 L. J. Q. B. 257.

(*y*) (1867), L. R. 2 Ch. 391; 36 L. J. Ch. 222.

turned out to be unsound. This was Jordan's action for the price of the mare, and the question was whether or not there was a complete contract. This question was decided in the negative. "The correspondence," said Parke, B., "amounts altogether merely to this: that the defendant agrees to give twenty guineas for the mare, if there is a warranty of her being sound and quiet in harness generally, but to that the plaintiff has not assented. The parties have never contracted in writing *ad idem*."

It takes two to make a contract, and those two must have agreeing minds (*z*). That being so, an offer must be assented to *in the precise terms in which it is made*. Jordan *v.* Norton is an excellent illustration of this. So is Hutchison *v.* Bowker (*a*), where, it having been shown that in the corn trade there was a distinction between "good" barley and "fine" barley, there was held to be no binding contract between a person who offered to sell "good" barley and one who wrote back, "we accept your offer, *expecting you to give us fine barley and full weight*." So, too, if there is an offer of a house, and the answer is, "I decide to take the house, if you and my agent, Mr. So and So, can agree upon the terms; if not, write to me," there is no final agreement (*b*). Again, in Lloyd *v.* Nowell (*c*), where an agreement in writing between the plaintiff and the defendant provided that the former was willing to sell to the latter a leasehold house "subject to the preparation by my" (the plaintiff's) "solicitor and completion of a formal contract," it was held that this condition prevented the agreement from being final. But it has been held that although in the written acceptance of a tender there may be an intimation that a more formal docu-

"Good" barley and "fine" barley.

(*z*) Where parties had corresponded by means of a telegraphic code, and the words in the proposal for a contract were understood and acted upon by them in different senses, it was held, in the recent case of Falck *v.* Williams, [1900] A. C. 176; 69 L. J. P. C. 17, that there was no contract, and that it was for the plaintiff, in an action for breach of contract, to show that his construction was the true one, and to prove that his proposal was so clear and unambiguous that the defendant could not be heard to say that he misunderstood it.

(*a*) (1839), 5 M. & W. 535; 52 R. R. 821.

(*b*) Stanley *v.* Dowdeswell (1874), L. R. 10 C. P. 102; 23 W. R. 389; and see Appleby *v.* Johnson (1874), L. R. 9 C. P. 158; 43 L. J. C. P. 146; Hussey *v.* Horne-Payne (1879), 4 App. Ca. 311; 48 L. J. Ch. 846; and Preston *v.* Luck (1884), 27 Ch. D. 497; 33 W. R. 317.

(*c*) [1895] 2 Ch. 744; 64 L. J. Ch. 744.

ment will be afterwards prepared, yet the parties may be bound to the terms of the tender and acceptance (*d*).

If, however, there has been a complete acceptance of an offer, the mere addition by the acceptor of words outside the bargain does not prevent the creation of a contract. A recent illustration of this rule is to be found in the case of Simpson *v.* Hughes (*e*), where, in answer to a letter by the agent of the defendant containing an offer to sell freehold land, the plaintiff wrote accepting the offer, but added: "I should like to know from what time Mr. Hughes wishes the purchase to date"; also, "You do not mention fences, but I should be obliged if they may be seen to at once as they really need attention"; and the Court held that these remarks were not to be treated as part of the bargain, and the letter of the plaintiff was a complete acceptance of the offer.

Incomplete contract.

The mere statement of the lowest price at which a vendor will sell contains no implied contract to sell at that price to the person making the inquiry. In Harvey *v.* Facey (*f*), the plaintiffs telegraphed, "Will you sell us B. H. P.? Telegraph lowest cash price," and the defendants telegraphed in reply, "Lowest price for B. H. P. 900*l.*" and then the plaintiffs telegraphed, "We agree to buy B. H. P. for 900*l.* asked by you. Please send us your title-deed in order that we may get early possession," but received no reply. It was held that there was no contract, as the final telegram was not the acceptance of an offer to sell, for none had been made, but was itself an offer to buy, the acceptance of which must be expressed and could not be implied.

Contract sometimes binding on one party only.

The contract may be binding on one party, but not on the other; *e.g.*, on the party contracting with an infant, but not on the infant himself (*g*); on the party who has signed a contract within the Statute of Frauds, but not on the party who has not signed (*h*). So, a person whose tender to supply stores to a railway company, "in

(*d*) Lewis *v.* Brass (1877), 3 Q. B. D. 667; 37 L. T. 738; distinguishing Rossiter *v.* Miller (1878), 3 App. Ca. 1124; 48 L. J. Ch. 10. See also Bolton *v.* Lambert (1889), 41 Ch. Div. 295; 58 L. J. Ch. 425; Bristol Aërated Bread Co. *v.* Maggs (1890), 44 Ch. D. 616; 59 L. J. Ch. 472; discussed in Bellamy *v.* Debenham (1890), 45 Ch. D. 481; 60 L. J. Ch. 166; upheld, though on different grounds, by the Court of Appeal, [1891] 1 Ch. 412; 60 L. J. Ch. 166; Filby *v.* Hounsell, [1896] 2 Ch. 737; 65 L. J. Ch. 852. A good selection of the numerous cases deciding what amounts to an unqualified acceptance is to be found in Pollock on Contracts, pp. 40—43 (7th ed.).

(*e*) (1897), 66 L. J. Ch. 334; 76 L. T. 237.

(*f*) [1893] A. C. 552; 62 L. J. P. C. 127.

(*g*) Holt *v.* Ward (1733), 2 Strange, 937; 2 Barn. 173.

(*h*) Laythoarp *v.* Bryant (1836), 2 Bing. N. C. 735; 5 L. J. (N. S.) C. P. 217.

such quantities as the company's storekeeper might order from time to time," is accepted, may be bound to supply though the company are not bound to order (*i*). It should be observed that the acceptance of the tender did not make the contract sued upon; it was merely an intimation by the company that they regarded Witham's tender as an offer; the tender was really a standing offer which could be revoked by notice to the company at any time before it was accepted by an order being given.

Inferred contracts.

Contracts may be inferred as well as expressed. An inferred contract is one which the Court, on principles of reason and justice, presumes from the conduct of the parties they intended to make; for either the offer or acceptance, or both, may be conveyed by conduct as well as by words, that is, may be tacit, or express. If, for instance, a man avails himself of the benefit of services done for him, the Court may supply the formal words of contract and require him to pay an adequate compensation. An instance of an implied contract is furnished by Pollard *v.* Photographic Co. (*k*), where it was held that a photographer may not sell or exhibit, or otherwise deal with the photographic negatives of a private person who has employed him to take the photograph (*l*).

Inferred or tacit contracts are sometimes erroneously called implied contracts; but the former are true contracts, while the latter are *quasi*-contracts merely, or, in other words, in the former the Court may infer, in the latter the law will imply, the promises (*m*).

(*i*) G. N. Ry. Co. *v.* Witham (1873), L. R. 9 C. P. 16; 43 L. J. C. P. 13.

(*k*) (1889), 40 Ch. D. 345; 58 L. J. Ch. 251; approved in Boucas *v.* Cooke, [1903] 2 K. B. 227.

(*l*) See also Tuck *v.* Priester (1887), 19 Q. B. D. 629; 56 L. J. Q. B. 553; approved by the Privy Council in the recent case of *Graves & Co., Ld.* v. *Gorrie*, [1903] A. C. 496; and Merryweather *v.* Moore, [1892] 2 Ch. 518; 61 L. J. Ch. 505; Lamb *v.* Evans, [1893] 1 Ch. 218; 62 L. J. Ch. 404; Robb *v.* Green, [1895] 2 Q. B. 315; 11 T. L. R. 330.

(*m*) Per cur. Morgan *v.* Ravey (1861), 30 L. J. Ex. 131; 6 H. & N. 265; Just. Inst. lib. 3, tit. 27. "Quasi ex contractu, teneri videntur."

CAPACITY OF PARTIES.

Infants.

[3] PETERS *v.* FLEMING. (1840)

[6 M. & W. 42; 9 L. J. Ex. 81.]

Mr. Fleming was an undergraduate at Cambridge, son of a gentleman of fortune and a Member of Parliament, and while under age he became indebted to a tradesman of the town for rings, pins, a watch, and various other articles, which were supplied to him on credit. When he came of age, the tradesman successfully brought an action against him, and recovered the price of the goods. "The true rule," said Parke, B., "I take to be this, that all such articles as are *purely ornamental* are not necessary, and are to be rejected, because they cannot be requisite for anyone; and for such matters, therefore, an infant cannot be made responsible. But, if they are not strictly of this description, then the question arises, whether they were bought for the necessary use of the party in order *to support himself properly in the degree, state and station of life in which he moved;* if they were, for such articles the infant may be responsible."

RYDER *v.* WOMBWELL. (1868) [4]

[L. R. 4 Ex. 32; 38 L. J. Ex. 8.]

Mr. Wombwell was the younger son of a deceased Yorkshire baronet. During his minority he had 500*l.* a year, and when he came of age would be entitled to a lump sum of 20,000*l.* While yet a minor, he ordered of Ryder and Co., the jewellers, a silver gilt goblet of the value of 15*l.* 15*s.*, and a pair of studs of the value of 25*l.* The studs were for his own wearing, but the goblet was intended, as the plaintiff was aware, as a present to a friend. To an action for the price of these articles, Wombwell set up the defence of "infancy," to which the reply was "necessaries."

At first the judges thought the studs were "necessaries," though not the goblet; but it was finally resolved that *neither the studs nor the goblet were necessaries.*

A person under the age of twenty-one is an "infant," and by the common law his contracts are voidable at his option, either before or after he attains his majority, unless for *necessaries*. A modern statute (the Infants' Relief Act, 1874) made certain contracts by infants not only voidable, but absolutely void.

It is not always easy to determine what are "necessaries," for the term is, in law, a relative one, and differs according to the circumstances and condition in life of the infant at the time of the sale and delivery. Nothing can be a necessary which cannot possibly be useful; though the converse is not true, for a useful thing may be of unreasonably extravagant design or material.

Sale of Goods Act, 1893.

Section 2 of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), provides that "Where necessaries are *sold and delivered* to an infant he must pay a reasonable price therefor. 'Necessaries' in this section, mean goods suitable to the condition in life of such infant, and to his actual requirements at the time of the *sale and delivery*." The following rules may, therefore, now be taken to be established, namely, (a) That an infant is not liable for non-acceptance of necessaries; (b) That the "actual requirements" of the infant are

to be determined, not at the date of the order, but at the time of delivery or supply (*a*).

Necessaries.

Food, clothes, medicine and the like—such things as are essential to life—are what the lay mind would understand by "necessaries." But in process of time the word has acquired a technical meaning which cannot be ascertained in a particular instance without reference to the cases. Amongst things held to be "necessary" may be mentioned a racing bicycle (*b*), a servant's livery (*c*), a volunteer uniform (*d*), horse exercise (*e*), decent burial (*f*), instruction in a trade, education (*g*); while, on the other hand, a valuable chronometer (*h*), cigars and tobacco (*i*), and dinners out of college (*k*), have been held not to be. In the case of an infant, who was entitled to an income of between 7*l*. and 8*l*. a week during his minority, such things as (1) cartridges, (2) champagne, and (3) jewellery presented to a lady to whom the infant was engaged without the consent of his guardian, but who did not become his wife, were recently (*l*) held not to be "necessaries." A great deal depends on the social position of the infant; and, as civilization advances and luxuries increase, things become admitted into the class of "necessaries" which, when simpler tastes prevailed, might have been dispensed with. The question, whether "necessaries" or not, is one *for the jury*, subject to the control of the Court. Evidence being given of the things supplied, and the circumstances of the infant, the Court determines whether the things supplied can reasonably be considered necessaries at all; and if it comes to the conclusion that they cannot, it may not even submit

(*a*) This rule is submitted as the correct interpretation of the section. The words, however, taken in their most grammatical sense, refer only to cases where sale and delivery take place *uno ictu*. It might also be said that they refer to two separate times; so that if the infant was sufficiently supplied at either the time of sale or the time of delivery, the goods would not be necessaries. Another suggested meaning is to read the word "and" as "or," in which case the seller would be entitled to recover the price of necessaries, if at either of the above times the infant had "actual requirements." This section is fully and ably dealt with in the treatise by Ker and Pearson-Gee on The Sale of Goods Act, pp. 9—18.

(*b*) Clyde Cycle Co. *v.* Hargreaves (1898), 78 L. T. 296.

(*c*) Hands *v.* Slaney (1799), 8 T. R. 578.

(*d*) Coates *v.* Wilson (1804), 5 Esp. 152; 8 R. R. 841.

(*e*) Hart *v.* Prater (1837), 1 Jur. 623; 49 R. R. 746.

(*f*) Chapple *v.* Cooper (1844), 13 M. & W. 252; 13 L. J. Ex. 286.

(*g*) Walter *v.* Everard, [1891] 2 Q. B. 369; 60 L. J. Q. B. 738.

(*h*) Berolles *v.* Ramsay (1815), Holt, N. P. 77; 17 R. R. 610.

(*i*) Bryant *v.* Richardson (1866), L. R. 3 Ex. 93 (3).

(*k*) Brooker *v.* Scott (1843), 11 M. & W. 67; Wharton *v.* McKenzie (1844), 5 Q. B. 606; 13 L. J. Q. B. 130.

(*l*) Hewlings *v.* Graham (1901), 70 L. J. Ch. 568; 84 L. T. 497.

the case to the jury, but at once direct judgment to be entered for the defendant. It should, however, be observed that the infant cannot bind himself to the payment of any particular sum for necessaries, or to give any particular price for them, as he is only liable to pay a *reasonable* price (*m*).

A purchase by an infant of necessaries on credit will be valid, even though it be proved that he had an income at the time sufficient to furnish him with ready money to supply himself with necessaries suitable to his condition (*n*). An infant cannot bind himself by the acceptance of a bill of exchange, even though given for the price of necessaries supplied to him (*o*). But he is liable on a bond, without penalty, given for necessaries, the form, however, of the contract being disregarded, and the obligation being treated as one on simple contract (*p*).

An infant is liable for "necessaries" supplied to his wife and children just as much as if they were supplied to himself (*q*).

Already well supplied.

Even, however, when the goods are "necessaries," the infant can get away from his contract by showing that he was already plentifully supplied with such things; and ignorance of a tradesman, who supplies goods of a useful class, that the infant is already sufficiently supplied, cannot assist him, for he acts at his peril. In the case of Johnstone *v.* Marks (*r*), Lord Esher, M. R., remarked, "It lies upon the plaintiff to prove not that the goods supplied belong to the class of necessaries as distinguished from that of luxuries, but that the goods supplied when supplied were necessaries to the infant. The circumstance that the infant was sufficiently supplied at the time of the additional supply is obviously material to this issue, as well as fatal to the contention of the plaintiff with respect to it." And it is now clear (see sect. 2 of the Sale of Goods Act, 1893, *supra*) that the knowledge or belief of the tradesman has nothing to do with the question whether the

(*m*) Cas. Law and Equity, 185; 56 & 57 Vict. c. 71, s. 2.

(*n*) Burghart *v.* Hall (1839), 4 M. & W. 727; 8 L. J. Ex. 235.

(*o*) *In re* Soltykoff, *Ex parte* Margrett, [1891] 1 Q. B. 413; 60 L. J. Q. B. 339.

(*p*) Walter *v.* Everard, [1891] 2 Q. B. 369; 60 L. J. Q. B. 738; quoting Russell *v.* Lee (1662), Lev. 86; Coke, Litt. 172; Vin. Ab. Enfant, c. (7).

(*q*) Turner *v.* Frisby (1794), 1 Str. 168, and Rainsford *v.* Fenwick (1671), Carter, 215; and see Ford *v.* Fothergill (1795), Peake, 301; 1 Esp. 211; and Chapple *v.* Cooper (1844), 13 M. & W. 259; 13 L. J. Ex. 286.

(*r*) (1887), 19 Q. B. D. 509; 57 L. J. Q. B. 6, following Barnes *v.* Toye (1884), 13 Q. B. D. 410; 53 L. J. Q. B. 567; Bainbridge *v.* Pickering (1780), 2 Wm. Bl. 1325; Brayshaw *v.* Eaton (1839), 5 Bing. N. C. 231; 8 L. J. (N. S.) C. P. 517; Foster *v.* Redgrave (1866), L. R. 4 Ex. 35, n. 8; Ryder *v.* Wombwell, must be considered overruled on this point, decided by the court of first instance, L. R. 3 Ex. 90; 38 L. J. Ex. 8.

goods are necessary or not. The actual, and not the apparent, position and means of the infant at the date of the contract are alone material.

Specific performance.

An infant cannot succeed in an action for specific performance, because, the infant not being himself bound, the remedy is not mutual (*s*).

Rashness of lending money to infants.

An infant need not repay money lent to him, even though lent for the purpose of his buying necessaries with it; for, as Parker, C. J., suggested in a case (*t*) of the kind, "it may be borrowed for necessaries, but spent at a tavern, and therefore the law will not trust him but at the peril of the lender who must lay it out for him." And see sect. 5 of 55 Vict. c. 4, *post*, p. 19.

Part performance.

If an infant pays money under a contract which has been wholly or partly performed by the other party, he cannot by rescinding the contract recover the money back, though he might have done so if the goods had not been delivered or the contract otherwise wholly or partly performed, for the maxim *quod fieri non debuit, factum valet* will apply (*u*).

Beneficial contracts.

By way of corollary to an infant's liability for necessaries, it has been said that he may be absolutely bound by a contract which is clearly for his benefit; thus in Wood *v.* Fenwick (*x*), Lord Abinger, C. B., said, "There can be no doubt that, generally speaking, a contract by an infant to receive wages for his labour is binding upon him." So, too, in Clements *v.* London and North Western Ry. Co. (*y*), an infant railway servant, who, as a condition of his service, entered an insurance society, established and contributed to by the railway company, and agreed to accept the benefits of the society in lieu of any claims under the Employers' Liability Act, was held bound by the agreement, as being for his benefit. On the other hand, however, in Flower *v.* London and North Western Ry. Co. (*z*), an agreement by an infant with a railway company, in consideration of being allowed to travel on special terms, to waive all claims by himself, his executors, administrators, or relatives, for accident, injury or loss to himself or his property on the railway, even if occasioned by negligence of the company's servants, and to indemnify the company against any such claim, was held to be detrimental to the infant, and therefore not binding on him. An

(*s*) Flight *v.* Bolland (1828), 4 Russ. 298; 28 R. R. 101.

(*t*) Earle *v.* Peale (1712), 1 Salk. 386.

(*u*) Holmes *v.* Blogg (1818), 8 Taunt. 508; 2 Moore, 552; *Ex parte* Taylor (1856), 8 D. M. & G. 254; Valentini *v.* Canali (1889), 24 Q. B. D. 166; 59 L. J. Q. B. 74.

(*x*) (1842), 10 M. & W. 195; and see Leslie *v.* Fitzpatrick (1877), 3 Q. B. D. 229; 47 L. J. M. C. 22.

(*y*) [1894] 2 Q. B. 482; 63 L. J. Q. B. 837.

(*z*) [1894] 2 Q. B. 65; 63 L. J. Q. B. 547.

agreement by a next friend not to appeal, on the understanding that the successful defendant would not ask for costs, was, in Rhodes *v.* Swithenbank (*a*), held not to be binding on the infant, as being of no benefit to her, as she was not under any circumstances liable for costs. Covenants in an apprenticeship deed that the infant shall not enter into any professional engagement without the master's consent, are not binding, and will not be enforced by injunction (*b*). An agreement, however, by an infant, in consideration of being employed as a milk carrier, not to compete in business within a radius of five miles for two years after leaving, has been held to be valid (*c*). "The true question is whether the particular stipulation complained of is so unfair as to make the entire contract disadvantageous to the infant. You may find in any contract a clause which by itself is not to the advantage of the infant; but that is not enough: the contract, *as a whole*, must be disadvantageous" (*d*).

The rule that an infant's contract is binding on him if for his benefit is not confined to contracts of apprenticeship or service (*e*). Particular covenants in an infant's settlement may be valid (*f*), but they must be beneficial (*g*).

Other party may be bound.

Although an infant (except in the cases stated above) cannot contract so as to bind *himself*, yet he binds *the other party;* infancy being "a personal privilege of which no one can take advantage but the infant himself." Thus, if a boy of seventeen were to propose to a widow of forty, and agree to marry her, his promise to her would not be actionable, but hers to him would be (*h*).

The Infants' Relief Act, 1874 (*i*), provides as follows:—

Infants' Relief Act, 1874.

Sect. 1. All contracts, whether by specialty or by simple contract, henceforth entered into by infants for the repayment of money lent or to be lent, or for goods supplied or to be supplied (other than

(*a*) (1889), 22 Q. B. D. 577; 58 L. J. Q. B. 287.

(*b*) Gylbert *v.* Fletcher (1607), Cro. Car. 179; Meakin *v.* Morris (1884), 12 Q. B. D. 352; 53 L. J. M. C. 72; approved in Corn *v.* Matthews, [1893] 1 Q. B. 310; 62 L. J. M. C. 61; and De Francesco *v.* Barnum (1890), 43 Ch. D. 165; 59 L. J. Ch. 151; and see 45 Ch. D. 430; 60 L. J. Ch. 63.

(*c*) Evans *v.* Ware, [1892] 3 Ch. 502; 62 L. J. Ch. 256; and see Cornwall *v.* Hawkins (1872), 41 L. J. Ch. 435; Fellows *v.* Wood (1889), 59 L. T. 513; 52 J. P. 822; Brown *v.* Harper (1893), 68 L. T. 488; 3 R. 585; and Haynes *v.* Doman, [1899] 2 Ch. 13; 68 L. J. Ch. 419.

(*d*) Per Channell, J., in Green *v.* Thompson, [1899] 2 Q. B. 1; 68 L. J. Q. B. 719; distinguishing Corn *v.* Matthews, *supra*.

(*e*) Per Kay, L. J., in Clements *v.* L. & N. W. Ry. Co., *supra*.

(*f*) Smith *v.* Lucas (1881), 18 Ch. D. 531; 45 L. T. 460.

(*g*) Cooper *v.* Cooper (1887), 13 App. Cas. 88; 59 L. T. 1.

(*h*) Holt *v.* Ward (1733), 2 Str. 937; 2 Barn. 173.

(*i*) 37 & 38 Vict. c. 62.

contracts for necessaries), and all accounts stated with infants, shall be absolutely void: Provided always, that this enactment shall not invalidate any contract into which an infant may by any existing or future statute, or by the rules of the common law or equity, enter, except such as now by law are voidable.

Sect. 2. No action shall be brought whereby to charge any person upon any promise made after full age to pay any debt contracted during infancy, or upon any ratification made after full age of any promise or contract made during infancy, whether there shall or shall not be any new consideration for such promise or ratification after full age (*k*).

By the Common Law, all infants' contracts (except for necessaries) were voidable (*l*); now, by sect. 1 of this Act, three kinds of contracts are absolutely void. Although sect. 2 avoids any ratification after full age of *any* contract made during infancy, the result is not to place voidable contracts in the same position as contracts absolutely void. If a contract void under sect. 1 has been partly performed by the infant, he cannot set aside what has been done. Sect. 2 supersedes sect. 5 of Lord Tenterden's Act (9 Geo. 4, c. 14), by which no ratification could be sued on unless in writing.

Courtship and marriage.

One or two breach of promise of marriage cases have called for the construction of this second section: and from them it would appear that, before the lady can get damages from the defendant, she must show distinctly that he committed himself to a *fresh promise* after he came of age: *e.g.* (as in Ditcham *v.* Worrall (*m*)), by asking her to *name the day*, or (as in Northcote *v.* Doughty (*n*)) by saying, "*Now I may and will marry you as soon as I can.*" The mere continuance of amatory conduct will not do, because no new promise can be implied from such attentions, and the Act of Parliament prevents their being looked at as a ratification (*o*).

Marriage settlement.

A settlement of property made by an infant on her marriage is (except where authorized by the Infants' Settlement Act, 1855 (*p*)), as regards the infant, voidable and not void, and is not within either section of the Infants' Relief Act, 1874 (*q*); and, accordingly, the infant is bound to repudiate the settlement if at all, within a reasonable time after her coming of age (*r*).

(*k*) Smith *v.* King, [1892] 2 Q. B. 543; 67 L. T. 420. See also *In re* Foulkes, Foulkes *v.* Hughes (1893), 69 L. T. 183; 3 R. 682, a case where, after majority, a reconveyance and fresh mortgage were executed.

(*l*) Williams *v.* Moor (1843), 12 L. J. Ex. 253; 11 M. & W. 256.

(*m*) (1880), 5 C. P. D. 410; 49 L. J. C. P. 688.

(*n*) (1879), 4 C. P. D. 385.

(*o*) Coxhead *v.* Mullis (1878), 3 C. P. D. 439; 47 L. J. C. P. 761.

(*p*) 18 & 19 Vict. c. 43.

(*q*) Duncan *v.* Dixon (1890), 44 Ch. D. 211; 59 L. J. Ch. 437.

(*r*) Edwards *v.* Carter, [1893]

The Betting and Loans (Infants) Act, 1892 (*s*), renders penal the inciting of infants to betting or wagering or to borrowing money, and sect. 5 provides as follows:—"If any infant, who has contracted a loan which is void in law, agrees after he comes of age to pay any money which in whole or in part represents or is agreed to be paid in respect of any such loan, and is not a new advance, such agreement, and any instrument, negotiable or other, given in pursuance of or for carrying into effect such agreement, or otherwise in relation to the payment of money representing or in respect of such loan, shall, so far as it relates to money which represents or is payable in respect of such loan, and is not a new advance, be void absolutely as against all persons whomsoever.

Contract for payment of loan advanced during infancy void.

"For the purposes of this section any interest, commission or other payment in respect of such loan shall be deemed to be a part of such loan."

An infant may be a member of a building society registered under the Building Societies Act, 1874 (37 & 38 Vict. c. 42), and may by sect. 38 "give all necessary acquittances"; but he cannot execute a valid mortgage to secure advances made to him by the society. When money is advanced to an infant for the purpose of purchasing land, the infant cannot, after attaining twenty-one, affirm the purchase and, at the same time, repudiate the advance; and, in the event of his affirming the purchase, to the extent to which the money advanced has gone to the purchase of the land and the costs of the conveyance, the lender can stand in the place of the vendor of the land and enforce the vendor's lien (*t*). But advances made to an infant for the purpose of erecting buildings on the land purchased cannot be treated as forming one transaction with the purchase, and are not binding on the infant, and a mortgage given to secure such advances is void under sect. 1 of the Infants' Relief Act, 1874 (*supra*), and, in the absence of fraud or misrepresentation on the part of the infant, will be ordered to be delivered up and cancelled (*t*).

Interest in property.

An infant who enjoys a beneficial interest in property is liable to such obligations as are incident to such interest; *e.g.*, if an infant contracts for necessary repairs to be done to his dwelling-house, he will not be allowed to avail himself of his infancy as an

A. C. 360; 63 L. J. Ch. 160; and *sub nom.* Carter *v.* Silber, [1892] 2 Ch. 278; 61 L. J. Ch. 401. This case also decided that, in order to establish the invalidity of an infant's repudiation of a contract after he comes of age, it is not necessary to show his knowledge of the facts and of his rights; but that he must be treated as knowing the contents of the deed whether he knew them or not.

(*s*) 55 Vict. c. 4.

(*t*) Nottingham Permanent Benefit Building Society *v.* Thurstan, [1903] A. C. 6; 72 L. J. Ch. 134.

answer to a fair claim for payment of the price of the work so done (*u*); if he is a shareholder he is liable to pay calls on his shares when he comes of age, unless he has previously repudiated the contract (*x*); if he is a partner (although he cannot be made liable for partnership debts) he is bound by the partnership accounts as between himself and his partners; and so if, being a lessee, he continues to hold land after coming of age, he is liable for arrears of rent accrued during his infancy (*y*).

Torts. An infant is liable for a tort, but a breach of contract cannot be treated as a tort so as to make the infant liable; the wrong must be more than a misfeasance in the performance of the contract; it must be something quite outside the terms of the contract. Thus, in the case of Jennings *v.* Rundall (*z*), where an infant hired a mare to ride and injured her by over-riding, it was held that he could not be made liable for damages upon the contract by bringing the action in tort for negligence. But where an infant hired a horse for riding, and the plaintiff expressly refused to let it for jumping, and the infant lent it to a friend to use for jumping, and it was thereby killed, it was held that the infant was liable; for, as Willes, J., said, "it was a bare trespass not within the object and purpose of the hiring; it was doing an act altogether forbidden by the owner" (*a*). An infant innkeeper or carrier cannot be made liable in contract for the loss of goods entrusted to him in his business (*b*). On this principle it was held that an infant could not be made liable for a false representation, at the time of making the contract, that he was of full age; but he might be liable to restore any advantage thereby obtained, and be bound by payments made or acts done on the faith of such representations. He may, however, be liable in equity on the ground that "an infant may not take advantage of his own fraud," and since the Judicature Acts the rule of equity prevails. Compare Clarke *v.* Cobley (*c*) and Lemprière *v.* Lange (*d*). And this latter case was recently followed in Woolf *v.* Woolf (*e*), where

(*u*) Smith *v.* Low (1739), 1 Atk. 489; Ashfield *v.* Ashfield (1635), Wm. Jones, 157.

(*x*) See Hamilton *v.* Vaughan Electrical Engineering Co., [1894] 3 Ch. 589; 63 L. J. Ch. 795. But a transfer to an infant of shares in a company which becomes insolvent before the infant attains his majority will be treated as a nullity, and the transferor will remain liable. Capper's Case (1868), L. R. 3 Ch. 458.

(*y*) Co. Litt. 2 b; Kettle *v.* Elliott (1614), Rolle, Abr. 1, 731 K.

(*z*) (1799), 8 T. R. 335; 4 R. R. 680; Manby *v.* Scott (1672), 1 Sid. 129; Stikeman *v.* Dawson (1847), 16 L. J. Ch. 205.

(*a*) Burnard *v.* Haggis (1863), 32 L. J. C. P. 189; 14 C. B. N. S. 45; Price *v.* Howett (1852), 8 Ex. 146; Johnson *v.* Pie (1665), Sid. 258.

(*b*) Rolle, Abr. p. 2, D. par. 3.

(*c*) (1789), 2 Cox, 173; 2 R. R. 25.

(*d*) (1879), 12 Ch. D. 675; 41 L. T. 378.

(*e*) [1899] 1 Ch. 343; 68 L. J. Ch. 82.

an injunction was granted to restrain an infant defendant from representing that the business carried on by him was connected with the business carried on by the plaintiff, and the Court held that it had jurisdiction to order the infant defendant to pay the costs of the action. An infant cannot be made bankrupt by a creditor under a voidable contract (*f*). An infant cannot make admissions, but can now be interrogated, or ordered to make an affidavit of documents. So also can his next friend or guardian *ad litem* (*g*).

Bankrupt.

Although an infant cannot compromise an action brought against him, the Court has jurisdiction to sanction such a compromise if it is satisfied that it will be for his benefit (*h*). The ordinary course is to direct a reference to chambers whether the proposed compromise is beneficial (*i*), but if the judge is satisfied on the evidence before him, that will suffice (*k*). Where an action is pending the terms of the proposed compromise should as a rule be brought before the Court by a petition stating the terms, and verified by the solicitor's affidavit, that he is advised by counsel that the terms would be beneficial to the infant (*l*). In modern practice, however, a compromise on behalf of an infant is not unfrequently sanctioned upon summons, and when there is no action pending, the sanction is often obtained upon an originating summons under Order 55, rule 3 (f) of the Rules of the Supreme Court. The Court, however, has no power to sanction a compromise against the opinion of the next friend, or the guardian *ad litem* and counsel, and if the next friend is exercising his discretion *bonâ fide* he cannot be interfered with.

Compromise of action.

In Smith *v.* King (*m*) a compromise by a person who had attained twenty-one was held to be merely a renewal of a promise to that effect made by the person when an infant, and consequently was void under sect. 2 of the Infants' Relief Act, 1874 (*supra*).

An infant is a "person" within the meaning of sect. 6 of the Companies Act, 1862 (*n*), and so entitled to sign a memorandum of association for the purpose of the incorporation of the company (*o*).

(*f*) *Ex parte* Jones (1881), 18 Ch. D. 109; 50 L. J. Ch. 673.

(*g*) See R. S. C. Order 31, rule 29.

(*h*) Hopgood *v.* Parkin (1870), L. R. 11 Eq. 80; Brooke *v.* Mostyn (1865), 2 De G. J. & S. 373; 34 L. J. Ch. 65.

(*i*) Seton on Decrees, p. 832.

(*k*) Lippiatt *v.* Holley (1839), 1 Beav. 423; Wall *v.* Bushby (1852), 1 B. C. C. 484.

(*l*) Gray *v.* Paull (1877), 46 L. J. Ch. 818; 25 W. R. 874; *In re* Birchall (1880), L. R. 16 Ch. D. 41; 44 L. T. 113.

(*m*) [1892] 2 Q. B. 543; 67 L. T. 420.

(*n*) 25 & 26 Vict. c. 89.

(*o*) *In re* Laxon & Co., [1892] 3 Ch. 555; 61 L. J. Ch. 667; and now by sect. 1 of the Companies Act, 1900 (63 & 64 Vict. c. 48), the certificate of incorporation of a company is conclusive.

Contracts of Lunatics.

[5] IMPERIAL LOAN CO. *v.* STONE.

[[1892] 1 Q. B. 599; 61 L. J. Q. B. 449.]

The action was on a promissory note signed by the defendant as surety, and his answer was that he was so insane at the time he signed the note that he was not capable of understanding the transaction, and the jury found that this was so. The question then arose whether it was necessary for the defendant to prove further that the plaintiff knew of his state of mind. It was held that the defendant must show that at the time of the contract his insanity was known to the plaintiff.

"What I am about to state," said Lord Esher, M. R., "appears to me to be the result of all the cases. When a person enters into a contract, and afterwards alleges that he was so insane at the time that he did not know what he was doing, and proves the allegation, the contract is as binding on him in every respect, *whether it is executory or executed*, as if he had been sane when he made it, unless he can prove further that the person with whom he contracted knew him to be so insane as not to be capable of understanding what he was about."

"It seems to me," said Lopes, L. J., "that the principle to be deduced from the cases may be summarized thus: A contract made by a person of unsound mind is not voidable at that person's option if the other party to the contract believed at the time he made the contract that the person with whom he was dealing was of sound mind. In order to avoid a *fair* contract on the ground of insanity, the mental incapacity of the one must be known to the

other of the contracting parties. A defendant who seeks to avoid a contract on the ground of his insanity, must plead and prove, not merely his incapacity, but also the plaintiff's knowledge of that fact, and unless he proves these two things he cannot succeed."

The law as to the validity of contracts entered into with lunatics has recently been settled by the Court of Appeal in the above leading case (*p*). The presumption is in favour of sanity, and the burden of proof lies on the party disputing it (*q*).

A contract made by a person of sound mind who afterwards becomes a lunatic is not invalidated by the lunacy, and in Owen *v.* Davies (*r*) specific performance of such a contract was decreed. As to the mode in which such contracts may be carried out, reference should be made to the provisions of the Lunacy Act, 1890 (*s*).

Lucid interval.

Contracts entered into by a lunatic during a lucid interval are valid (*t*).

Agency.

The insanity of the principal, as between himself and his agent, *ipso facto* revokes the agency; but the lunatic is liable on contracts entered into by the agent with persons ignorant of the fact of the principal's lunacy, and to whom the lunatic had, when sane, represented the agent's authority (*u*).

The insanity of an agent also *ipso facto* revokes the agency.

Marriage.

A lunatic is incapable of contracting marriage (*x*). A contract to marry, therefore, as it results in imposing a *status* upon the parties which they cannot enter into unless sufficiently sane to understand the import of their acts, becomes void by the insanity of one of the parties, because it is then impossible of performance; and it is

(*p*) The following are some of the more important of the earlier cases, namely: Niell *v.* Morley (1804), 9 Ves. 478; Brown *v.* Jodrell (1827), M. & M. 105; Baxter *v.* Portsmouth (1826), 5 B. & C. 170; 7 D. & R. 614; Dane *v.* Kirkwall (1838), 8 C. & P. 679; Molton *v.* Camroux (1848), 4 Ex. 17; 18 L. J. Ex. 356; Beavan *v.* M'Donnell (1854), 9 Ex. 309; 23 L. J. Ex. 94; Elliott *v.* Ince (1857), 7 De G. M. & G. 475; 26 L. J. Ch. 821. See also Co. Litt. 247 b; and Beverley's case (1613), Co. Rep. 123 b.

(*q*) And see Jacobs *v.* Richards (1854), 18 Beav. 300; 23 L. J. Ch. 557; and Durham *v.* Durham, Hunter *v.* Edney, Cannon *v.* Smalley (1885), L. R. 10 P. D. 80.

(*r*) (1747), 1 Ves. sen. 80.

(*s*) 53 Vict. c. 5. See especially sects. 120 and 135; also, *In re* Pagani, [1892] 1 Ch. 236; 66 L. T. 244; and Baldwyn *v.* Smith, [1900] 1 Ch. 588; 69 L. J. Ch. 588.

(*t*) Hall *v.* Warren (1804), 9 Ves. 605; 7 R. R. 306; Selby *v.* Jackson (1843), 6 Beav. 192; 13 L. J. Bk. 249.

(*u*) Drew *v.* Nunn (1879), 4 Q. B. D. 661; 48 L. J. Q. B. 591.

(*x*) Browning *v.* Reane (1812), 2 Phill. Eccl. Cas. 69; Hancock *v.* Peaty (1867), L. R. 1 P. & D. 335; 36 L. J. Mat. 57.

immaterial whether the insanity existed at the time of contracting, and whether it was known or not to the other party (*y*).

Necessaries.

Since the fusion of law and equity, it is not very material to decide whether, if a person supplies necessaries to a lunatic, knowing of the lunacy at the time, a contract on the part of the lunatic to pay for them can be implied. Brett, L. J., in the case of *In re* Weaver (*z*), thought not; but in the later case of *In re* Rhodes (*a*) (where the numerous authorities are referred to), the Court of Appeal, affirming Kay, J., dissented from this view, and held that the Court will imply such an obligation where necessaries have been supplied under circumstances which justify the Court in implying an obligation to repay the money spent upon them. And now, by sect. 2 of the Sale of Goods Act, 1893 (*b*), where necessaries are sold and delivered to a person who, by reason of mental incapacity or drunkenness, is incompetent to contract, he must pay a reasonable price therefor; and "necessaries" in this section mean goods suitable to the condition in life of the purchaser, and to his actual requirements at the time of the sale and delivery.

Sale of Goods Act, 1893.

Trustee's rights.

If a trustee has properly expended sums of money for the protection and safety, or for the maintenance and support of his *cestui que trust*, at a time when the latter was of unsound mind, he will be allowed credit for such sums of money (*c*).

Wife's necessaries.

A husband is liable for necessaries supplied to his wife while he is lunatic; for the wife's authority to pledge his credit for necessaries is not a mere agency, but arises from the relation of husband and wife, and is not revoked by the husband's insanity (*d*).

Delusions.

Mere delusions with regard to the subject-matter of it will not in themselves be sufficient reason for setting a contract aside. Thus, it has been held that a lease of a farm may be valid though the lessor laboured under the fancy that it was impregnated with sulphur (*e*). "Although a man," said Jessel, M. R., "may believe a farm to be impregnated with sulphur, and not fit for himself to live in, he may still be a shrewd man of business, and may even

(*y*) Durham *v.* Durham, *supra*.

(*z*) (1882), 21 Ch. D. 615; 48 L. T. 93.

(*a*) (1890), 44 Ch. D. 94; 59 L. J. Ch. 298; and see Howard *v.* Digby (1834), 2 Cl. & F. 634; 37 R. R. 276; Wentworth *v.* Tubb (1841), 1 Y. & C. C. C. 171; *Re* Macfarlane (1862), 2 J. & H. 673; *Re* Gibson (1871), L. R. 7 Ch. 52; 25 L. T. 551.

(*b*) 56 & 57 Vict. c. 71.

(*c*) Sherwood *v.* Sanderson (1815), 19 Ves. 280; 13 R. R. 193; Williams *v.* Wentworth (1842), 5 Beav. 325; 59 R. R. 515; Nelson *v.* Duncombe (1846), 9 Beav. 211; Stedman *v.* Hart (1854), Kay, 607; 23 L. J. Ch. 908; and *In re* Watson, Stamford Union *v.* Bartlett, [1899] 1 Ch. 72; 68 L. J. Ch. 21.

(*d*) Read *v.* Legard (1851), 6 Ex. 636; 20 L. J. Ex. 309; and Drew *v.* Nunn, *supra*.

(*e*) Jenkins *v.* Morris (1880), 14 Ch. D. 674; 42 L. T. 817.

believe that the other side may not know of the impregnation of the farm with the sulphur, and that in consequence he may get a higher price for it than if it was known that it was so impregnated. He may have been perfectly right in his conclusion upon that subject, and the jury may have thought that it was so."

Drink. Persons drunk are in the same position as lunatics with regard to the capacity of contracting (*f*).

Duress. A person is not bound by a contract which he has entered into *under duress*, and he may recover what he has paid under duress, or he may enforce the contract, as it is only voidable at his option. It would appear that it is not now necessary for the avoidance of a transaction on this ground that the duress should be of a physical kind, or addressed immediately to the person professing to contract. "I think it must be regarded as the law," said Denman, J., "that if a man asserts to the father of a debtor that his son is liable to a criminal prosecution, and the father is led by reason of that assertion to suppose that the fact is so, and by reason of that belief is led to give a promissory note, or to bind himself for the payment of a composition by the son, then and in that case the transaction is not a fair one. It is *not to be looked at as a voluntary act, but as a case of extortion*, whether the facts are in accord with the assertion or not" (*g*). But, on the other hand, reference should be made to the recent case of Barnes *v.* Richards (*h*), where it was held by Lord Alverstone, C. J., that, notwithstanding the finding of the jury that the plaintiff had been induced to enter into the agreement by undue pressure exercised upon him by the defendants, the plaintiff was bound by the arrangement which had been embodied in a deed of release.

A threat to make a man bankrupt, or to bring a civil action against him, is not such duress as will avoid an agreement made in consequence thereof (*i*). Where a person is liable to be proceeded against both civilly and criminally (*e.g.*, for libel), an agreement entered into with the prosecutor will not *primâ facie* be void on the ground of duress (*k*). Although a duress of goods will not avoid a

(*f*) As to the power to recover expenses against an inebriate's estate, see the Inebriates Act, 1898 (61 & 62 Vict. c. 60), s. 12.

(*g*) Secar *v.* Cohen (1881), 45 L. T. 589; and see Williams *v.* Bayley (1866), L. R. 1 H. L. 200; 35 L. J. Ch. 717; and Davies *v.* London and Provincial Marine Insurance Co. (1878), 8 Ch. D. 469; 47 L. J. Ch. 511.

(*h*) (1902), 71 L. J. K. B. 341; 86 L. T. 231.

(*i*) Powell *v.* Hoyland (1851), 6 Ex. 67; 20 L. J. Ex. 82; and see *Ex parte* Hall (1882), 19 Ch. D. 580; 51 L. J. Ch. 556.

(*k*) Fisher *v.* Apollinaris Co. (1875), L. R. 10 Ch. 297; 44 L. J. Ch. 500. But such an agreement may be void as being against public policy. See Windhill Local Board *v.* Vint (1890), 45 Ch. D. 351; 59 L. J. Ch. 608.

contract, still money may be recovered which has been paid in order to obtain possession of goods wrongfully withheld on the ground that the payment is not a voluntary one (*l*). Duress of an agent, through fear that his principal will suffer, will avoid the contract (*m*).

The duress necessary to avoid a contract is *not* that which would create such fear as would impel a person of ordinary courage and resolution to yield to it. "Whenever from natural weakness of intellect or from fear, whether reasonably entertained or not, either party is actually in a state of mental incompetence to resist pressure improperly brought to bear, there is no more consent than in the case of a person of stronger intellect and more robust courage yielding to a more serious danger. The difficulty consists not in any uncertainty of the law on the subject, but in its application to the facts of each individual case." Per Butt, J., in Scott *v.* Sebright (*n*). And a good illustration of this proposition is to be found in the recent case of Ford *v.* Stier (*o*). There the Court granted a decree for the nullity of the marriage, where the petitioner was induced to go through a ceremony of marriage by her mother under the belief that it was a mere form of betrothal, and it being shown that the mother exercised a great influence over her daughter, so that the petitioner was really acting under the duress of her mother and the respondent.

As to cases of undue influence as distinguished from cases of duress, see *post*, p. 172.

(*l*) Wakefield *v.* Newton (1844), 13 L. J. Q. B. 258; 6 Q. B. 276; see per Parke, B., in Parker *v.* Bristol and Exeter Ry. Co. (1851), 6 Exch. 702, 705; 20 L. J. Ex. 442; and see *post*, p. 174.

(*m*) Cumming *v.* Ince (1847), 11 Q. B. 112.

(*n*) (1886), 12 P. D. at p. 24; 56 L. J. P. 11. See also Nevill *v.* Snelling (1880), 15 Ch. D. 679; 49 L. J. Ch. 777; *In re* Leigh (1888), 40 Ch. D. 290; 58 L. J. Ch. 306.

(*o*) [1896] P. 1; 65 L. J. P. 13. See also Bartlett *v.* Rice (1896), 72 L. T. 122.

Contracts of Corporations.

ARNOLD *v.* MAYOR OF POOLE. (1842) [6]

[4 M. & Gr. 860; 12 L. J. C. P. 97.]

Arnold was a solicitor, and did some work for the Poole corporation. But though the corporation had passed a resolution directing the work to be done, and though they knew perfectly well of its progress, yet when the time came to pay they declined to do so, successfully sheltering themselves under the defence that *the contracts of a corporation are not binding unless made under its corporate seal.*

CLARKE *v.* THE CUCKFIELD UNION. (1852) [7]

[21 L. J. Q. B. 349; 16 Jur. 686.]

At a meeting of the board of guardians, an order was given to Clarke to put up some water-closets in the workhouse, and this order Clarke executed. When, however, the work was finished, the guardians refused to pay for it, defending themselves on the technical ground that there was no contract under seal. But it was held that sealing was unnecessary, as the purposes for which the guardians were incorporated obliged them to provide water-closets; and, besides, the contract was an executed one, and it would be the height of injustice that the corporation should keep the benefit of the contract while it impugned its validity.

Corporation may sometimes

The contract of a corporation aggregate requires a seal. To this rule, however, there are exceptions for the sake of convenience.

contract without seal.

Matters of trifling importance, daily occurrence, or urgent necessity, may be contracted for without seal (*p*). An inferior servant, for instance, may be engaged by parol; and it has been held that the Hull corporation might make agreements for the admission of ships into their docks without any sealing being necessary (*q*). Moreover, when a company is incorporated *for trading purposes*, it may make all such contracts as are of ordinary occurrence in that trade, irrespective of the magnitude of the particular transaction, without seal: thus, a contract of a colliery company for the erection of pumping machinery (*r*); a contract with a gas company for the supply of gas meters (*s*), or to supply gas to customers (*t*); a contract of a telegraph company with an agent for sending messages (*u*); a contract by a navigation company for the supply of provisions for ships (*x*), or for bringing home an unseaworthy ship (*y*); and a contract of a railway company for the supply of iron rails (*z*), have been held to be valid and enforceable although without the corporate seal. But, on the other hand, a contract of a dock company for cleansing their docks (*a*), and a contract by a railway company for making material alterations on their line in order to adapt it to a different system of locomotion (*b*), have been held to be contracts not within the ordinary scope of the company's business, and therefore to require a seal.

Trading company.

It should be observed that there is an express proviso in sect. 3 of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), that it shall not affect the law relating to corporations.

Contracts on behalf of a joint stock company registered under 25 & 26 Vict. c. 89 (the Companies Act, 1862), may, by virtue of 30 & 31 Vict. c. 131, s. 37, be generally made without seal.

Coals for

Clarke *v.* Cuckfield was followed in Nicholson *v.* The Bradfield

(*p*) Ludlow *v.* Charlton (1840), 6 M. & W. 815; 8 C. & P. 242; Church *v.* Imp. Gas Co. (1838), 6 A. & E. 846; 3 N. & P. 35.

(*q*) Wells *v.* Kingston-upon-Hull (1875), L. R. 10 C. P. 402; 44 L. J. C. P. 257; and see Stevens *v.* Hounslow Burial Board (1890), 61 L. T. 839; 38 W. R. 236.

(*r*) South of Ireland Colliery Co. *v.* Waddle (1869), L. R. 4 C. P. 617; 38 L. J. C. P. 338.

(*s*) Beverley *v.* Lincoln Gas Co. (1837), 6 A. & E. 829; 7 L. J. Q. B. 113.

(*t*) Church *v.* Imperial Gas Co. (1838), 6 A. & E. 846; 7 L. J. Q. B. 118.

(*u*) Reuter *v.* Electric Telegraph Co. (1856), 6 E. & B. 341; 26 L. J. Q. B. 46.

(*x*) Australian Mail Co. *v.* Marzetti (1855), 11 Ex. 228; 24 L. J. Ex. 273.

(*y*) Henderson *v.* Australian Mail Co. (1855), 5 E. & B. 409; 24 L. J. Q. B. 322.

(*z*) *Re* Contract Corporation (1869), L. R. 8 Eq. 14; 20 L. T. 964.

(*a*) London Dock Co. *v.* Sinnot (1857), 8 E. & B. 347; 27 L. J. Q. B. 129.

(*b*) Diggle *v.* London and Blackwall Ry. Co. (1850), 5 Ex. 442; 19 L. J. Ex. 308.

Union (*c*), which was an action for the price of coals supplied to guardians for the use of their workhouse. "The goods in the present case," said Blackburn, J., "have actually been supplied to and accepted by the corporation. They were such as must necessarily be from time to time supplied for the very purpose for which the body was incorporated, and they were supplied under a contract, in fact, made by the managing body of the corporation. If the defendants had been an unincorporated body, nothing would have remained but the duty to pay for them. We think that the body corporate cannot under such circumstances escape from fulfilling that duty merely because the contract was not under seal." Workhouse.

And the Court of Appeal in the recent case of Lawford *v.* Billericay Rural Council (*d*) expressly approved and followed these cases.

So it would seem that when a corporation has entirely performed its part of a simple contract, it may sue the other party for non-performance of his part. Thus, a corporation, it has been held, can sue a tenant who has occupied their lands without deed for use and occupation (*e*). And a tenancy from year to year may be created by occupation and payment of rent under a lease which is void for want of the corporate seal (*f*). On the other hand, a corporation may also be charged for the actual use and occupation of land (*g*); but the liability of the corporation is measured by the actual period of occupation, and an implied tenancy from year to year founded on the payment of rent and occupation will not be inferred (*h*). Part performance.

In the case of the Mayor of Oxford *v.* Crow (*i*), it was held that in order to render an agreement to surrender a lease granted by a municipal corporation enforceable against the tenant, the agreement must be under the seal of the corporation, or the committee appointed by the corporation to negotiate with the lessee must be appointed under seal, or the agreement must have been ratified by

(*c*) (1866), L. R. 1 Q. B. 620; 35 L. J. Q. B. 176; and see Haigh *v.* North Brierley (1858), E. B. & E. 873; 28 L. J. Q. B. 62. On the other hand, see Lamprell *v.* Billericay (1849), 3 Ex. 283; 18 L. J. Ex. 282; and Paine *v.* Strand (1846), 8 Q. B. 326; 15 L. J. M. C. 89.

(*d*) [1903] 1 K. B. 772; 72 L. J. K. B. 554.

(*e*) Stafford *v.* Till (1827), 4 Bing. 75; 5 L. J. C. P. 77; and see Fishmongers' Co. *v.* Robertson (1842), 5 M. & G. 131; 12 L. J. C. P. 185; Kidderminster *v.* Hardwick (1873), L. R. 9 Ex. 13; 43 L. J. Ex. 9; Melbourne Banking Co. *v.* Brougham (1879), 4 App. Cas. 156; 48 L. J. P. C. 12.

(*f*) See Wood *v.* Tate (1806), 2 B. & P. N. R. 247; 9 R. R. 645; and Eccles. Commrs. *v.* Merral (1869), L. R. 4 Ex. 162; 38 L. J. Ex. 93.

(*g*) Lowe *v.* L. & N. W. Ry. Co. (1852), 18 Q. B. 632; 21 L. J. Q. B. 361.

(*h*) Finlay *v.* Bristol and Exeter Ry. Co. (1852), 7 Ex. 409; 21 L. J. Ex. 117.

(*i*) [1893] 3 Ch. 535; 69 L. T. 228; approving Kidderminster *v.* Hardwick, *supra*.

the corporation under seal, or must have been performed in part or acted upon.

Hunt *v.* Wimbledon Local Board.

But when a statute constituting a corporation provides that its contracts shall be made with sealing, a contract is void unless so made, and, though work has been done, it need not be paid for. Under sect. 174 of the Public Health Act, 1875 (*k*), "every contract made by an urban authority, whereof the value or amount exceeds 50*l*., shall be in writing, and sealed with the common seal of such authority (*l*)." The Wimbledon Local Board provided the first case on the construction of this section (*m*). They verbally directed their surveyor to employ a Mr. Hunt to prepare plans for new offices. When the plans were finished, they were submitted to the board and approved by them; but the proposed offices were never built. The value of the plans was about 90*l*., and Hunt tried in an action to make the local board pay that amount to him. In this attempt, however, he failed. "Even independently of the statute," said Brett, L. J., "I am of opinion that the plaintiff cannot recover. But I am further of opinion that the statute in this case is conclusive; and it seems to me that the statute is clearly more than *directory*. It is what has been called *mandatory*. It prevents certain contracts from being valid in any way, and the real meaning of the section seems to be this: the Legislature, knowing of the exceptions which existed at the time the statute was passed with regard to small contracts of frequent occurrence which are necessary for the carrying on of the business of the corporation, intended to get rid of any discussion as to what *were* small matters, and to say that contracts which the board would not otherwise be authorized to make might be made for amounts less than 50*l*.;—that is to say, that if they were necessary, and under 50*l*., they should be brought within the recognized exception as to small matters, and that, if they were over 50*l*., the mere fact of their being over 50*l*. would prevent their coming within the exception."

Young *v.* Leamington.

Hunt *v.* Wimbledon Local Board was followed in the case of Young *v.* The Mayor of Leamington (*n*), where it was held that a municipal corporation, acting as an urban sanitary authority, were

(*k*) 38 & 39 Vict. c. 55.

(*l*) Such contracts must also "specify some pecuniary penalty to be paid in case the terms of the contract are not duly performed." Sub-sect. 2; and see the recent case of The British Insulated Wire Company, Limited *v.* The Prescot Urban District Council, [1895] 2 Q. B. 538; 65 L. J. Q. B. 190.

(*m*) Hunt *v.* Wimbledon Local Board (1878), 4 C. P. D. 48; 48 L. J. C. P. 207.

(*n*) (1883), 8 App. Cas. 517; 52 L. J. Q. B. 713; and see Phelps *v.* Upton Snodsbury Highway Board (1885), 49 J. P. 408; 1 C. & E. 524.

not bound to pay for works executed for them, and of which they had obtained the full benefit, because there was no contract under seal as required by sect. 174. But in another case (*o*) (in which a doctor had agreed to attend a number of scarlet-fever patients in an encampment outside the town of Grantham at the rate of 5*s.* 3*d.* per tent per day, and had attended till the amount due to him was nearly 100*l.*), it has been held that *the section applies only to a contract where, at the time of entering into it, the parties contemplate the "value or amount" as exceeding* 50*l.* "In Hunt *v.* Wimbledon Local Board," said Lush, L. J., "it must be taken that it was known by all parties that the plans would cost more than 50*l.* In the present case it was not known, at the time when the contract was entered into, how long it would be necessary to employ the plaintiff as a medical man, or how much his charges might amount to. His employment depended upon the continuance of the outbreak of fever." Scarlet fever at Grantham.

In Melliss *v.* Shirley Local Board ((1885) 14 Q. B. D. 911; 54 L. J. Q. B. 408), the plaintiffs were employed as engineers to construct works for draining the defendants' district, and the contract entered into certainly fell within sect. 174. After doing work exceeding 50*l.* in value, the plaintiffs induced the defendants to affix their seal to the contract, which had till then not been done. Mr. Justice Cave held, that part of the work being unperformed when the seal was affixed, and consideration being present, the plaintiffs might sue and recover. The Court of Appeal (16 Q. B. D. 446; 55 L. J. Q. B. 143), in dealing with another point raised in this case, reversed the decision of Cave, J., but did not express any opinion upon his construction of sect. 174 (*p*). The Shirley case.

In Scott *v.* Clifton School Board (*q*), the plaintiff, who had been appointed architect of the board, was held entitled, under the provisions of 33 & 34 Vict. c. 75 (the Elementary Education Act, 1870), to recover payment for his services, notwithstanding that the appointment and orders were not under seal. The Clifton School Board case.

When an urban authority enters into a contract duly sealed, pursuant to sects. 173 and 174 of the Public Health Act, 1875, with a contractor for the construction by him, *e.g.*, of sewerage works, and the contract contains the usual power for the engineer, Variations in contract.

(*o*) Eaton *v.* Basker (1881), 7 Q. B. D. 529; 50 L. J. Q. B. 444; and see Att.-Gen. *v.* Gaskill (1882), 22 Ch. D. 537; 52 L. J. Ch. 163.

(*p*) See also Brooks *v.* Torquay Corporation, [1902] 1 K. B. 601; 71 L. J. K. B. 109, where the retainer of a solicitor was not given under seal until part of his services had been rendered, and the defendants were held liable for the whole of his costs.

(*q*) (1884), 14 Q. B. D. 500; 52 L. T. 105.

who has the control and supervision of the works, to vary, alter, enlarge, or diminish any of them, all variations and alterations coming within the terms of the power conferred on the engineer can be validly made without being under the common seal of the urban authority. And an agreement between an urban authority and a contractor employed to construct works for them, as a compromise and in full settlement of all claims by him against the urban authority, is not a contract within sect. 173 of the Public Health Act, 1875, necessary for carrying that Act into execution, so as to require to be sealed with the common seal of the urban authority under sect. 174; and therefore such agreement, though not under seal, is capable of being enforced against the urban authority (*r*).

Compromise of dispute.

Implied contracts.

A corporation may be liable on an implied contract, *e.g.*, for money paid to the use of the corporation (*s*). Specific performance will be decreed against, or on behalf of, a corporation where there has been part performance by one party, which has been acquiesced in by the other, under such circumstances as would render it inequitable to object to complete on the ground of invalidity (*t*).

Capacity to contract.

A corporation has the same powers of contracting as a natural person, so far as they are capable of being exercised by an artificial person (who must always act by an agent) (*u*); subject to the qualification established by the case of Ashbury Railway Carriage Co. *v.* Riche (*x*), namely, that where there is an Act of Parliament creating a corporation for a particular purpose, and giving it powers for that particular purpose, what it does not expressly or impliedly authorize is to be taken as prohibited. An excellent illustration of this well-established rule is to be found in the decision of the House of Lords in the recent case of London County Council *v.* Attorney-General (*y*), where the Council having statutory powers

(*r*) See Williams *v.* Barmouth Urban Council (1897), 77 L. T. 383; and Attorney-General *v.* Gaskill (1882), 22 Ch. D. 537; 52 L. J. Ch. 163.

(*s*) Jefferys *v.* Gurr (1832), 2 B. & Ad. 833; 1 L. J. K. B. 23.

(*t*) Laird *v.* Birkenhead Ry. Co. (1859), Johns. 500; 29 L. J. Ch. 218; Wilson *v.* West Hartlepool Ry. Co. (1864), 2 D. J. & S. 475; 34 L. J. Ch. 241; Crook *v.* Corporation of Seaford (1871), L. R. 6 Ch. 551; 25 L. T. 1.

(*u*) See Burnley Equitable Co-operative Society *v.* Casson, [1891] 1 Q. B. 75; 60 L. J. M. C. 59; in which it was held that a contract of apprenticeship is *not* invalid by reason of the fact that the master to whom the apprentice is bound is a corporation.

(*x*) (1875), L. R. 7 H. L. 653; 44 L. J. Ex. 185; and see Att.-Gen. *v.* G. E. Ry. Co. (1880), 5 App. Cas. 473; 49 L. J. Ch. 545; Baroness Wenlock *v.* River Dee Co. (1885), 10 App. Cas. 354; 54 L. J. Q. B. 577.

(*y*) [1902] A. C. 165; 71 L. J. Ch. 268.

to acquire and work *tramways* were held not to be entitled to run a service of *omnibuses*, such service not being a necessary incident of the business of a tramway company. Contracts *ultra vires* are void, not for illegality, but for incapacity (*z*). A company cannot, unless specially authorized, buy shares in another company, nor can it purchase its own shares (*a*), nor can it engage in any business other than that for which it was constituted (*b*). See also *post*, p. 357, on the subject of contracts *ultra vires*.

Contracts of Married Women.

PIKE *v.* FITZGIBBON. (1881) [8]

[17 Ch. D. 454; 50 L. J. Ch. 394.]

The plaintiffs were bankers, with whom Lady Louisa Fitzgibbon had kept a separate account which had, during her coverture, become overdrawn. This overdrawing, as the plaintiffs alleged, had been allowed on the ground that Lady Louisa was known by them to have considerable estates settled to her separate use, and had agreed to repay the advances out of her separate estate. The main object of the action was to attach the interest of Lady Louisa in estates to which she was entitled as tenant for life in possession for her separate use, with a restraint on anticipation. The Court of Appeal held that the plaintiffs' claim could only be enforced against so much of the

(*z*) See Newcastle-upon-Tyne (Mayor) *v.* Att.-Gen., [1892] A. C. 568; 62 L. J. Q. B. 72.

(*a*) *In re* Barned's Banking Co. (1867), L. R. 3 Ch. 105; 37 L. J. Ch. 81; Trevor *v.* Whitworth (1887), 12 App. Cas. 409; 57 L. J. Ch. 28.

(*b*) Copper Miners' Co. *v.* Fox (1851), 16 Q. B. 229; 20 L. J. Q. B. 174; Featherstonhaugh *v.* Lee Moor Co. (1865), L. R. 1 Eq. 318; 35 L. J. Ch. 84; Mann *v.* Edinburgh Tramways, [1893] A. C. 69; 62 L. J. P. C. 74; and see Stephens *v.* Mysore Reefs, [1902] 1 Ch. 745; 71 L. J. Ch. 295.

separate estate as was free from any restraint on anticipation to which she was entitled at the time when the engagements were entered into, and which remained at the time when judgment was given. James, L. J., said: "It is said that a married woman having separate estate has not merely a power of contracting a debt to be paid out of that separate estate, but, having a separate estate, has acquired a sort of equitable *status* of capacity to contract debts, not in respect only of that separate estate, but in respect of any separate estate which she may thereafter in any way acquire. In my opinion, there is no authority for that contention." "It seems to me," said Brett, L. J., "that it is not true to say that equity has recognized or invented a *status* of a married woman to make contracts; neither does it seem to me that equity has ever said that what is now called a contract is a binding contract upon a married woman. What equity seems to me to have done is this, it has recognized a settlement as putting a married woman into the position of having what is called a separate estate, and has attached certain liabilities not to her but to that estate." And Cotton, L. J., added: "In my opinion that fallacious use of the expression, that a married woman having separate estate is regarded as a *feme sole*, has given rise to a great part of the argument on behalf of the plaintiffs."

"In order to construe an Act of Parliament it was laid down long ago in Heydon's case (*c*) that one of the most material things to consider is the state of the law before the Act, and the defect in that law which the Act was intended to remedy. In 1881 the attention of the profession and public had been called to the law with relation to the pecuniary obligations of married women by a decision of the Court of Appeal in Pike *v.* Fitzgibbon. . . . In that state of the law the Married Women's Property Act, 1882, was passed" (*d*).

(*c*) (1584), 3 Rep. 7 b.
(*d*) Per Kay, L. J., in Pelton *v.* Harrison, [1891] 2 Q. B. 422; 60 L. J. Q. B. 742.

Although, therefore, the law enunciated in Pike *v.* Fitzgibbon was repealed by the Married Women's Property Act, 1882 (*e*), still its *ratio decidendi* should be noted in order to appreciate the present state of the law relating to the capacity of married women to contract, which is now governed by the Married Women's Property Act, 1882, as altered by the Married Women's Property Act, 1893 (*f*).

Rights at common law and in equity.

At common law a married woman is incapable of making a valid contract; and this general principle was followed in equity, subject to the exception that she could contract so as to bind any property settled to her separate use and unrestrained from anticipation. Her person could not be made liable at law or in equity, but in equity her property might be subjected to claims under her contracts (*g*). By a deed acknowledged with the concurrence of her husband, a married woman could bind property not settled to her separate use, though, obviously, this was effectual as being the act more of the husband than the wife. So, too, a married woman might acquire rights under a contract where she supplied the consideration, as by giving her separate property, or her personal skill and services (*h*). A woman could not, during coverture, renew a debt which would otherwise be barred by the Statute of Limitations (*i*). The wife of the King of England has the same powers of contracting as a *feme sole* (*k*). Under certain circumstances a married woman had exceptional rights as to contracting, *e.g.*, where the husband was *civiliter mortuus*, or if she carried on a trade within the city of London, she might contract for the purposes of that trade. A further series of exceptions was created by the Divorce and Matrimonial Causes Act, 1857 (*l*); a woman divorced from her husband is restored to the position of a *feme sole;* so also in the case of a judicial separation so long as it continues (*m*); and of a wife, deserted by her husband, who has obtained a protection order. But a separation by agreement was not sufficient to give the wife power to bind herself by contracts (*n*). As a general rule,

Exceptions to incapacity.

Deed acknowledged.

Personal services.

Wife of the king.

Husband *civiliter mortuus.*

Trading in London.

Divorce and Matrimonial Causes Act.

(*e*) 45 & 46 Vict. c. 75.

(*f*) 56 & 57 Vict. c. 63.

(*g*) Johnson *v.* Gallagher (1861), 3 D. F. & J. 494; 30 L. J. Ch. 298; Picard *v.* Hine (1869), L. R. 5 Ch. 274; 18 W. R. 178.

(*h*) See Jones *v.* Cuthbertson (1873), L. R. 8 Q. B. 504; 42 L. J. Q. B. 221.

(*i*) Pittam *v.* Foster (1823), 1 B. & C. 248; 1 Wms. Saund. 172.

(*k*) Co. Litt. 133a.

(*l*) 20 & 21 Vict. c. 85.

(*m*) But this only applies to such property as she may acquire or which may come to or devolve upon her after the decree. Waite *v.* Morland (1888), 38 Ch. D. 135; 57 L. J. Ch. 655; and see Hill *v.* Cooper, [1893] 2 Q. B. 85; 62 L. J. Q. B. 423.

(*n*) Marshall *v.* Rutton (1818), 8 T. R. 545; 5 R. R. 448; Meyer *v.* Haworth (1838), 8 A. & E. 467; 3 N. & P. 462.

Contracts between husband and wife.

both in law and equity, there could be no valid contract between husband and wife, they being considered as one person; however, in equity, such a contract might be made respecting the wife's separate estate (*o*), or concerning the matrimonial rights (*p*).

McGregor *v.* McGregor.

In the case of McGregor *v.* McGregor (*q*), a husband and wife having taken out cross-summonses against each other for assaults, entered into an agreement with each other to withdraw the summonses and to live apart, the husband agreeing to allow the wife a weekly sum for maintenance, and the wife agreeing to maintain herself and her children, and to indemnify the husband against any debts contracted by her. An action having been brought by the wife against the husband for six weeks' arrears of maintenance under the agreement, it was held, that the husband and wife had power to make a contract for separation by way of compromise of legal proceedings, that the husband's contract to pay for maintenance was binding, and that the action was maintainable.

A married woman is liable at common law for a debt contracted before her marriage; and the Married Women's Property Acts, 1882 and 1893, leave that liability untouched, and judgment can therefore be obtained against her personally (*r*).

Paraphernalia.

At common law a married woman was allowed to acquire a limited property in such personal chattels as came within the definition of "paraphernalia," *i.e.*, apparel and personal ornaments suitable to her degree (*s*). If a husband made a gift of jewels or trinkets to his wife, before or during marriage, to be worn as personal ornaments, they became her paraphernalia (*t*); though at a later period it seems to have been considered that jewels given to a married woman, whether by her husband or a stranger, would become her separate property (*u*).

(*o*) Walrond *v.* Walrond (1858), Johns. 18; 28 L. J. Ch. 99.

(*p*) See Wilson *v.* Wilson (1853), 1 H. L. C. 538; 23 L. J. Ch. 697; Besant *v.* Wood (1879), 12 Ch. D. 605; 48 L. J. Ch. 497; Stanes *v.* Stanes (1877), 3 P. D. 42; 47 L. J. P. 19; Hart *v.* Hart (1881), 18 Ch. D. 670; 50 L. J. Ch. 697; and Aldridge *v.* Aldridge (1888), 13 P. D. 210; 58 L. J. P. 8.

(*q*) (1888), 21 Q. B. D. 424; 57 L. J. Q. B. 591; Sweet *v.* Sweet, [1895] 1 Q. B. 12; 64 L. J. Q. B. 108; Bateman *v.* Ross (1813), 1 Dow. 235; 14 R. R. 55; Vansittart *v.* Vansittart (1858), 4 K. & J. 62; 27 L. J. Ch. 222. See, however, Cahill *v.* Cahill (1883), 8 App. Cas. 420; 49 L. T. 605.

(*r*) Robinson *v.* Lynes, [1894] 2 Q. B. 577; 63 L. J. Q. B. 759.

(*s*) 2 Bl. Com. 436. See Jervoise *v.* Jervoise (1853), 17 Beav. 566; 2 W. R. 91; Laing *v.* Walker (1891), 64 L. T. 527.

(*t*) Burton *v.* Pierrepoint (1722), 2 P. Wms. 78; Jervoise *v.* Jervoise, *supra*.

(*u*) Grant *v.* Grant (1865), 34 Beav. 623; 34 L. J. Ch. 641; Williams *v.* Mercier (1884), 10 App. Cas. 1; 51 L. J. Q. B. 594; and see Graham *v.* Londonderry (1746), 3 Atk. 394.

The difference between paraphernalia of the wife and her separate property was this. She could not dispose of her paraphernalia, by will or otherwise, during her husband's life. The husband, on the other hand, could dispose of them during his lifetime, and they became, after his death, subject to his debts (*x*), although the wife could marshal his other assets, real or personal, as against his heir or legatee (*y*). The wife's separate property, on the other hand, is at her sole and absolute disposal, and is not subject to her husband's debts. The husband's power of disposition over his wife's paraphernalia could only be exercised during his lifetime; he could not dispose of them by will so as to defeat the wife's claim after his death (*z*).

This subject is not now of much practical importance, for under the Married Women's Property Act, 1882, property of whatsoever kind, whether articles of personal use or ornament, or otherwise, now belongs to the wife not as paraphernalia, but as her absolute separate property, even though not limited to her separate use, unless it is expressly given "as paraphernalia," or unless the husband and wife agree that certain articles shall be enjoyed by the wife as paraphernalia. Thus, it has been held (*a*) that gifts of jewellery made by a husband to his wife on occasions such as Christmas Day, or on her birthdays, or in order to settle differences that had arisen between them, are not paraphernalia, unless it can be shown that the husband intended to impress the character of paraphernalia upon them.

Wedding presents.

Wedding presents given to a woman in contemplation of marriage, *primâ facie* belong to her for her separate use (*b*).

Damages for personal injuries to married woman.

Damages awarded to a wife in an action by her husband and herself for personal injuries to her are separate property, and cannot, therefore, be attached to answer a judgment debt of the husband (*c*).

Alimony.

Alimony received by a wife under a decree for judicial separation from her husband was held, in Anderson *v.* Hay (*d*) *not* to be separate estate, and therefore not chargeable by a wife with payment of her debts.

(*x*) Ridout *v.* Earl of Plymouth (1740), 2 Atk. 104; Graham *v.* Londonderry, *supra;* Townshend *v.* Windham (1750), 2 Ves. S. 1, 7; Willson *v.* Pack, Prec. Ch. 295.

(*y*) Tipping *v.* Tipping (1721), 1 P. Wms. 730; Sudson *v.* Corbet (1746), 3 Atk. 369; Tynt *v.* Tynt (1729), 2 P. Wms. 541; but see Probert *v.* Clifford (1736), *ib.* 544, n.

(*z*) Tipping *v.* Tipping, *supra;* Seymour *v.* Tresilian (1737), 3 Atk. 358.

(*a*) Tasker *v.* Tasker, [1895] P. 1; 64 L. J. P. 36; distinguishing *In re* Vansittart, *Ex parte* Brown, [1893] 1 Q. B. 181; 62 L. J. Q. B. 277.

(*b*) *Re* Jamieson, *Ex parte* Pannell (1889), 60 L. T. 159; 37 W. R. 464.

(*c*) Beasley *v.* Roney, [1891] 1 Q. B. 509; 60 L. J. Q. B. 408.

(*d*) (1891), 55 J. P. 295.

Specific performance.

The Court cannot give judgment against a married woman personally to compel her to the specific performance of a contract (*e*), as to complete the sale or purchase of an estate (*f*), or to grant a lease (*g*). But an agreement to purchase, or to take a lease, is binding in respect of her separate property, which thus becomes chargeable with the purchase-money or rent, or any other debt or damages due under the agreement (*h*). And a personal order may be made against a married woman to pay into Court a sum of money in her hands in her office of administratrix of a deceased person, and for disobedience of such an order she may be attached (*i*); but if the money be no longer in her hands, but has been lost by breach of trust or *devastavit*, the order cannot be made in this form, but must be a proprietary order in the form settled in Scott *v.* Morley (*k*).

Injunction.

The creditor of a married woman, before obtaining judgment against her, has no specific charge upon her separate property, and, therefore, cannot claim an injunction to restrain her dealing with it (*l*). If she contracts other debts, her creditors do not rank in order of priority, but are entitled to be paid *pari passu* in the administration of her estate (*m*).

Statutes of Limitation.

The debts of a married woman are, like other debts, subject to the Statutes of Limitation, though, in effect, chargeable only upon her separate property, and though there is in fact no such property chargeable when the judgment is obtained (*n*).

Fraud.

A married woman (like an infant) cannot be sued for a fraud if it is directly connected with a contract, *e.g.*, where she has obtained advances by means of her guaranty, falsely representing herself as sole; and in cases of this kind a married woman is not estopped from pleading coverture by having described herself as *sui juris* (*o*). It was held, however, in the case of Vaughan *v.*

(*e*) But see Fry on Specific Performance (3rd ed.), p. 689.

(*f*) Francis *v.* Wigzell (1816), 1 Madd. 258.

(*g*) Aylett *v.* Ashton (1835), 1 M. & Cr. 105; 5 L. J. Ch. 71.

(*h*) Gaston *v.* Frankum (1849), 2 De G. & Sm. 561; 13 Jur. 739; Picard *v.* Hine (1869), L. R. 5 Ch. 274; 18 W. R. 178.

(*i*) *In re* Turnbull, Turnbull *v.* Nicholas, [1900] 1 Ch. 180; 69 L. J. Ch. 187.

(*k*) *Ib.*

(*l*) Robinson *v.* Pickering (1881), 16 Ch. D. 660; 50 L. J. Ch. 527; Pike *v.* Fitzgibbon, *supra*; and see Barber *v.* Gregson (1880), 49 L. J. Ex. 731; 43 L. T. 428.

(*m*) Johnson *v.* Gallagher (1861), 3 D. F. & J. 494; 30 L. J. Ch. 310; and see Shattock *v.* Shattock (1866), L. R. 2 Eq. 182; 35 L. J. Ch. 509.

(*n*) *Re* Hastings (1887), 35 Ch. D. 94; 56 L. J. Ch. 631. Leake on Contracts (4th ed.), p. 390.

(*o*) Liverpool Adelphi Loan Association *v.* Fairhurst (1854), 9 Ex. 422; 23 L. J. Ex. 163; Wright *v.* Leonard (1861), 11 C. B. N. S. 258; 30 L. J. C. P. 365; Earle *v.* Kingscote, [1900] 2 Ch. 585; 69 L. J. Ch. 725; Arnold *v.* Woodhams

Vanderstegen (*p*), that where a married woman had concealed her marriage, and held herself out as a *feme sole*, and thus borrowed money on mortgage, that the fraud thus committed rendered her property liable, notwithstanding she was actually covert at the time of the contract.

Imprisonment.

A married woman without separate property cannot be imprisoned for non-payment of the costs of an action (*q*).

Decree *nisi*.

The status of a married woman is not affected, or her capacity to contract restored, merely by the pronouncing of a decree *nisi* for the dissolution of her marriage (*r*). A contract invalid because made during coverture does not become valid by subsequent discoverture (*s*).

London Chartered Bank of Australia *v.* Lemprière.

The power given by equity to a married woman of binding by her contracts her separate estate was fully discussed, and many of the authorities cited, in the important case of the London Chartered Bank of Australia *v.* Lemprière (*t*).

Although a married woman is still only liable to the extent of her separate estate unrestrained from anticipation, yet her capacity to contract is *not* confined to dealings with her separate estate (*u*). Recent legislation has, by enlarging her separate estate, greatly increased her power of contracting.

Married Women's Property Acts.

The Married Women's Property Act, 1870 (*x*) (repealed in 1882), enabled a wife to effect a policy of assurance upon the life of herself or her husband, and gave to her as her separate estate various specified forms of property, including wages and money earned by her skill or labour.

The previous Acts of 1870 and 1874 were superseded, and the results of many equity cases dealing with separate estate were greatly enlarged by the Married Women's Property Act, 1882 (*y*). Separate property now consists of (1) all property acquired by a married woman after December 31st, 1882 (*z*); (2) property belonging at the time of marriage to a woman marrying after December 31st, 1882. A married woman's contract, *if entered into before the 5th of December*, 1893, is presumed to be made with respect to and to

(1873), L. R. 16 Eq. 29; 42 L. J. Ch. 578; Cannam *v.* Farmer (1849), 3 Ex. 698; 2 Car. & K. 746.

(*p*) (1854), 2 Drew. 363; and see *Re* Macintyre (1887), 21 L. R. Ir. 421; Liverpool, &c. Assoc. *v.* Fairhurst, *ubi supra*.

(*q*) *In re* Walter (1891), 55 J. P. 551.

(*r*) Norman *v.* Villars (1877), 2 Ex. D. 359; 46 L. J. Ex. 579.

(*s*) Beckett *v.* Tasker (1887), 19 Q. B. D. 7; 56 L. T. 636.

(*t*) (1873), L. R. 4 P. C. 572; 42 L. J. P. C. 49.

(*u*) Sweet *v.* Sweet, [1895] 1 Q. B. 12; 64 L. J. Q. B. 108.

(*x*) 33 & 34 Vict. c. 93.

(*y*) 45 & 46 Vict. c. 75.

(*z*) Reid *v.* Reid (1886), 31 Ch. D. 402; 55 L. J. Ch. 294.

bind her separate property (*a*); but she must own such property at the time the contract is made, and if so, her after-acquired separate property is bound (*b*). The onus of proving that a married woman had separate property at the time the contract was made lies on the person seeking to enforce a contract made during coverture (*c*). The Act does not alter the protection given to property restrained from anticipation, which is still secure from debts arising from contract (*d*).

Pelton *v.* Harrison.

It was accordingly held, in the case of Pelton *v.* Harrison (*e*), that a judgment, in respect of a contractual liability incurred by a woman during coverture, obtained against her after the death of her husband, as against her separate property not subject to any restriction against anticipation, could not, though she was discovert, be enforced against property which, during coverture, was her separate estate without power of anticipation.

Bankruptcy.

A wife trading apart from her husband is now made subject to the bankruptcy laws. It should, however, be observed that a judgment in the form settled in the case of Scott *v.* Morley (*supra*) does not entitle the judgment creditor to issue a bankruptcy notice against the married woman, whether she is trading separately from her husband or not (*f*). This exception, however, rests on the

(*a*) But where a married woman entered into a covenant in a mortgage deed for the payment of 400*l.*, and the only free separate estate that she had at the date of the covenant was about 3*l.* or 4*l.*, it was held that there was no presumption of law that the contract was entered into with respect to and to bind such small separate estate, and that the contract was not binding. Braunstein *v.* Lewis (1891), 65 L. T. 449; 55 J. P. 775. But see and compare Everett *v.* Paxton (1892), 65 L. T. 383; 55 J. P. 230.

(*b*) *Re* Shakespear (1885), 30 Ch. D. 169; 55 L. J. Ch. 44; Turnbull *v.* Forman (1885), 15 Q. B. D. 234; 54 L. J. Q. B. 489; Conolan *v.* Leyland (1884), 27 Ch. D. 632; 54 L. J. Ch. 123; King *v.* Lucas (1883), 23 Ch. D. 712; 49 L. T. 216; Chapman *v.* Biggs (1882), 11 Q. B. D. 27; 48 L. T. 704; Stogdon *v.* Lee, [1891] 1 Q. B. 661; 60 L. J. Q. B. 669.

(*c*) Palliser *v.* Gurney (1887), 19 Q. B. D. 519; 56 L. J. Q. B. 546; Leak *v.* Driffield (1890), 24 Q. B. D. 98; 59 L. J. Q. B. 89.

(*d*) Draycott *v.* Harrison (1886), 17 Q. B. D. 147; 34 W. R. 546. But see *In re* Dixon (1887), 35 Ch. D. 4; 56 L. J. Ch. 773; Scott *v.* Morley (1887), 20 Q. B. D. 120; 57 L. J. Q. B. 43; in which the proper form of judgment against a married woman under sect. 1, sub-sect. (2), of the Married Women's Property Act, 1882, was settled by the Court.

(*e*) [1891] 2 Q. B. 422; 60 L. J. Q. B. 742; and see Hood-Barrs *v.* Cathcart, [1894] 2 Q. B. 559; 63 L. J. Q. B. 602, 798; Loftus *v.* Heriot, [1895] 2 Q. B. 212; 11 T. L. R. 467; and *In re* Wheeler, Briggs *v.* Ryan, [1899] 2 Q. B. 717; 68 L. J. Ch. 663.

(*f*) *In re* Gardiner (1887), 20 Q. B. D. 249; 57 L. J. Q. B. 149; *In re* Lynes, *Ex parte* Lester, [1893] 2 Q. B. 113; 62 L. J. Q. B. 372; and *In re* Hewett, *Ex parte* Levene, [1895] 1 Q. B. 328; 64 L. J. Q. B. 185.

technical ground that a bankruptcy notice can only be in one form, that is, Form 6 in the Appendix to the Bankruptcy Rules, 1886, which says, "You must pay" to the creditor "the sum claimed by him as being the amount due on a final judgment obtained against you." The words "final judgment" mean a judgment on which the debtor is personally liable, and therefore do not apply to a judgment against a married woman. And if any other words were substituted for the words "final judgment," the notice would not be in the prescribed form.

Carrying on business.

A married woman does not "carry on business separately from her husband" within the meaning of sect. 1, sub.-sect. (5) of the Married Women's Property Act, 1882, simply because she has an interest in the business which is carried on, which is her separate property. The test is, whether she is trading independently of her husband (*g*). And she is deemed to be still "carrying on a trade" within the meaning of the section so long as any debts incurred by her while so trading remain unpaid (*h*).

Act of 1893.

But now, by sect. 1 of the Married Women's Property Act, 1893 (*i*), every contract entered into by a married woman, otherwise than as agent, after the 5th of December, 1893,

(a) shall be deemed to be a contract entered into by her with respect to and to bind her separate property, whether she is or is not in fact possessed of or entitled to any separate property at the time when she enters into such contract;
(b) shall bind all separate property which she may at that time or thereafter be possessed of or entitled to; and
(c) shall also be enforceable by process of law against all property which she may thereafter while discovert be possessed of or entitled to;

Provided that nothing in this section contained shall render available to satisfy any liability or obligation arising out of such contract any separate property which at that time or thereafter she is restrained from anticipating.

When restraint on anticipation ceases.

The restraint on anticipation, however, ceases to attach to a married woman's separate income as soon as it becomes due and payable to her under the trusts of the instrument under which she

(*g*) See *In re* Edwards, *Ex parte* Harvey (1896), 43 W. R. 519; 2 Manson, 182.

(*h*) *In re* Dagnall, *Ex parte* Soan, [1896] 2 Q. B. 407; 65 L. J. Q. B. 666; approved in *In re* Worsley, *Ex parte* Lambert, [1901] 1 K. B. 309; 70 L. J. K. B. 93; distinguishing *In re* Stevens, *Ex parte* McGeorge (1882), 20 Ch. D. 697; 51 L. J. Ch. 909.

(*i*) 56 & 57 Vict. c. 63.

is entitled (*k*). In the recent case of Barnett v. Howard (*l*) A. L. Smith, L. J., was of opinion that income of property vested in trustees for the separate use of a married woman subject to a restraint on anticipation, though paid into her hands after the determination of a coverture, was not available to satisfy an obligation arising out of a contract entered into during her coverture. And when, in an action founded upon contract, judgment is obtained against a married woman in the form settled in Scott *v.* Morley (*supra*), a receiver cannot be appointed of arrears of the income of her separate property subject to a restraint upon anticipation which have accrued due after the date of the judgment (*m*).

Costs. Section 2, however, provides that the Court may, in any action or proceeding instituted by a woman, or by a next friend on her behalf, order payment of the costs of the opposite party out of property subject to a restraint on anticipation, and may enforce such payment by the appointment of a receiver and the sale of the property or otherwise, as may be just. It should be remarked that this section only contemplates the case of a married woman *plaintiff* (*n*). A *counter-claim*, however, has been held to be a "proceeding instituted" by a married woman within the meaning of the section, and that consequently she may be ordered to pay the costs incurred thereby out of property which is subject to a restraint on anticipation (*o*). So, too, a claim by a married woman to goods taken in execution has been held to be a "proceeding instituted" so as to entitle the execution creditor to his costs out of property subject to a restraint on anticipation (*p*). On the other hand, the mere entering of a *caveat* in respect of a will, although the result is that a probate action has to be brought, is not such "an action or proceeding instituted" (*q*), nor is an *appeal* by a married woman from an order made in an action brought against her (*r*). The

(*k*) Hood-Barrs *v.* Heriot, [1896] A. C. 174; 65 L. J. Q. B. 352; overruling on this point Hood-Barrs *v.* Cathcart, [1894] 2 Q. B. 567; 63 L. J. Q. B. 602; Loftus *v.* Heriot, [1895] 2 Q. B. 212; 64 L. J. Q. B. 717; and Pillers *v.* Edwards (1895), 71 L. T. 788; 14 R. 290.

(*l*) [1900] 2 Q. B. 784; 69 L. J. Q. B. 955.

(*m*) Whiteley *v.* Edwards, [1896] 2 Q. B. 48; 65 L. J. Q. B. 457; *In re* Lumley, *Ex parte* Hood-Barrs, [1896] 2 Ch. 690; 65 L. J. Ch. 837.

(*n*) Hood-Barrs *v.* Cathcart, [1894] 3 Ch. 376; 63 L. J. Ch. 793; and see Crickitt *v.* Crickitt [1902], P. 177; 71 L. J. P. 65.

(*o*) *Ib.* [1895] 1 Q. B. 873; 64 L. J. Q. B. 520.

(*p*) Nunn *v.* Tyson, [1901] 2 K. B. 487; 70 L. J. K. B. 854.

(*q*) Moran *v.* Place, [1896] P. 214; 65 L. J. P. 83.

(*r*) Hood-Barrs *v.* Heriot, [1897] A. C. 177; 66 L. J. Q. B. 356; and see Paget *v.* Paget, [1898] 1 Ch. 470; 67 L. J. Ch. 266.

only proceeding contemplated by the section is one which initiates litigation.

Removal of restraint on anticipation.

Although the parties themselves cannot by consent get rid of a restraint against anticipation when once it is effectually imposed, the Court may, under sect. 39 of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), bind the interest of a married woman in any property, notwithstanding that she is restrained from anticipation, if it appears to the Court to be for her benefit. This section does not, however, enable the Court simply to remove the restraint, but only to bind her interest by a disposition where the Court is satisfied that it is beneficial (*s*). And in determining whether an order should be made under this section, the Court must consider whether it is for the general benefit of the married woman and is not confined to mere pecuniary considerations (*t*).

Settled Land Act, 1882.

It should also be observed that the powers conferred by the Settled Land Act, 1882 (45 & 46 Vict. c. 38), can be exercised by a married woman without application to the Court, notwithstanding that she is restrained from anticipation. (See sect. 61, sub-sect. (6).)

A husband may sue his wife for money which, after their marriage, he has advanced to her on a contract by her, either express or implied, to repay it out of her separate estate (*u*).

No personal liability.

It is important to observe that neither the Act of 1882 nor that of 1893 has imposed a personal liability on a married woman in respect of her contracts, but has simply largely extended the doctrine of separate estate as established by the courts of equity. And it should be observed that the words "for her separate use" are not now necessary to create separate estate; for if it is created by the operation of the Married Women's Property Acts, it is sufficient to support a restraint on anticipation, although the words "for her separate use" are not used (*x*).

(*s*) *In re* Warren's Settlement (1883), 52 L. J. Ch. 928; 49 L. T. 696.

(*t*) *In re* Pollard's Settlement, [1896] 2 Ch. 552; 65 L. J. Ch. 796; and see *In re* Blundell's Trusts, [1901] 2 Ch. 221; 70 L. J. Ch. 522.

(*u*) Butler *v.* Butler (1886), 16 Q. B. D. 374; 55 L. J. Q. B. 55.

(*x*) See *In re* Lumley, *Ex parte* Hood-Barrs, [1896] 2 Ch. 690; 65 L. J. Ch. 837.

Power of Wife to bind Husband to her Contracts.

[9] MANBY *v.* SCOTT. (1659)

[1 Sid. 112.]

"Scott's wife departed from him without his consent, and lived twelve years separate from him, and then returned; but he then would not receive her, nor allow her any maintenance, and discharged or forbade tradesmen, particularly the plaintiffs, from trusting her with any wares." The plaintiffs disregarded the prohibition, sold the wife goods at reasonable prices and fit for her quality, and then sued the husband. They did not succeed, however; and Manby *v.* Scott has been for more than two centuries the leading authority for the principle that the wife's contract does not bind her husband unless she acts by his authority.

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[10] MONTAGU *v.* BENEDICT. (1825)

[3 B. & C. 631; 27 R. R. 444.]

Mr. Benedict was a London lawyer, whose wife ordered various articles of expensive jewellery from the plaintiff without her husband's knowledge. In an action by the jeweller against the husband, it was argued for the plaintiff, with some plausibility, that the defendant and his wife were in comfortable circumstances of life, though they might not be rich; and that cohabitation was evidence of Benedict's assent to his wife's contract. It was, however,

unanimously held that the goods supplied were *not necessaries*, and that therefore the defendant could not be compelled to pay for them. "If a tradesman," said Bayley, J., "is about to trust a married woman for what are not necessaries, and to an extent beyond what her station in life requires, he ought, in common prudence, to inquire of the husband if she has his consent for the order she is giving."

SEATON *v.* BENEDICT. (1828) [11]

[5 Bing. 28; 2 M. & P. 66.]

After the jewellery case, just related, the Benedicts went to live at Twickenham. But Mrs. Benedict continued her extravagance. She became indebted to a local haberdasher for scarves, gloves, laces, and other articles; and finally the tradesman sued her husband.

The goods supplied were unquestionably necessaries, but then Mr. Benedict *had always duly furnished his wife with necessary apparel, and knew nothing of her clandestine dealings with Seaton;* and on this ground the plaintiff was disappointed in his expectations of getting paid. "It may be hard," said Best, C. J., "on a fashionable milliner that she is precluded from supplying a lady without previous inquiry into her authority. The Court, however, cannot enter into these little delicacies, but must lay down a law that shall protect the husband from the extravagance of his wife."

[12] JOLLY *v.* REES. (1863)

[15 C. B. N. S. 628; 33 L. J. C. P. 177.]

Mr. Rees, a country gentleman living near Llanelly, told his wife that he was not going to pay for any drapery or millinery goods she or her daughters might choose to buy on credit. They could do well enough, he said, on the allowance they already had. In spite of this distinct prohibition, Mrs. Rees gave Messrs. Jolly, hosiers and linendrapers at Bath, substantial orders, and they by-and-by sent Mr. Rees a substantial bill. This Mr. Rees declined to pay, and litigation ensued. The tradesmen *had not known that Mr. Rees had expressly forbidden his wife to incur surreptitious debts*, and the goods they had supplied were what the law calls "necessaries," so they felt confident of success. The judges, however, decided against them, and thus "carried to its logical results the principle that the wife's authority to bind her husband is a mere question of agency."

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[13] SMOUT *v.* ILBERRY. (1842)

[10 M. & W. 1; 12 L. J. Ex. 357.]

A man who had been in the habit of dealing with the plaintiff for meat supplied to his house went to China, leaving his wife and family behind, and died there. It was held that the wife was not liable for goods supplied to her after his death, but before the news of it had arrived, she having had originally full authority to contract, and done no wrong in representing her authority as continuing.

The law of husband and wife in respect of the wife's power to

bind her husband to a contract she has entered into since the marriage is best considered under two heads:—

(1.) When husband and wife are *living together*.
(2.) When they are *not*.

Living together.

(1.) When husband and wife are living together there is a presumption that the wife has her husband's authority to enter into a contract, in all domestic matters ordinarily entrusted to a wife, so as to bind him for *necessaries;* that is, a reasonable supply of such goods and service as are suitable in kind, sufficient in quantity, and necessary, in fact, for the use of the husband, wife, children and household, according to the conditions in which they live (*y*). But there are several ways in which a husband may rebut the presumption. He may show that at the time when his wife incurred the debt she was already properly supplied with necessaries, or, which is the same thing, with money to purchase them; he may show that he expressly forbade her to pledge his credit (*z*); he may show that he expressly forbade the plaintiff to trust her; or, lastly, he may show that the credit was given to the woman herself (*a*).

Moreover, the presumption must now be taken subject to the provisions of the Married Women's Property Act, 1893, that "every contract entered into by a married woman, otherwise than as agent, shall be deemed to be a contract entered into by her with respect to, and to bind, her separate property" (*b*).

Debenham *v.* Mellon.

Jolly *v.* Rees was brought under discussion, and approved of, by the House of Lords in the case of Debenham *v.* Mellon (*c*).

Separated.

(2.) When husband and wife are living apart, the presumption is that the wife has no authority to pledge her husband's credit. And when the separation is the wife's own fault, when she has left her home without just cause—*e.g.*, to live with an adulterer—this presumption cannot be rebutted. But if it is by mutual consent that husband and wife are living apart, she goes forth with implied authority to pledge his credit for necessaries. If, however, the husband makes his wife a sufficient allowance, or what she accepts as a sufficient allowance, when thus living separate, and actually

(*y*) See Lane *v.* Ironmonger (1844), 13 M. & W. 368; 14 L. J. Ex. 35; Reneaux *v.* Teakle (1853), 8 Ex. 680; 22 L. J. Ex. 241; and Phillipson *v.* Hayter (1870), L. R. 6 C. P. 38; 40 L. J. C. P. 14.

(*z*) *In re* Cook, *Ex parte* Holmes (1893), 10 M. B. R. 12.

(*a*) Bentley *v.* Griffin (1814), 5 Taunt. 356; Metcalfe *v.* Shaw (1811), 3 Camp. 22; 13 R. R. 740; and Morel *v.* Westmoreland, [1903] 1 K. B. 64; 72 L. J. K. B. 66. But see Jewsbury *v.* Newbold (1857), 26 L. J. Ex. 247.

(*b*) 56 & 57 Vict. c. 63, s. 1, repealing sect. 1, sub-sect. (3), of the 1882 Act (45 & 46 Vict. c. 75).

(*c*) (1880), 6 App. Cas. 24; 50 L. J. Q. B. 155.

pays it, the tradesman cannot recover against her husband (*d*); and it is not material that the tradesman had no notice of this allowance (*e*). Probably, too, if the lady has money of her own, or if she can earn it, she has no implied authority to pledge her husband's credit (*f*). A pension during the Crown's pleasure, however, would not exonerate the husband (*g*). If a wife has been driven out of doors by her husband, or if his conduct at home is so abominable that no decent woman would live under the same roof with him, there is an irrebuttable presumption by law that she has authority to pledge his credit for necessaries (*h*).

Necessaries, what are.

"Necessaries" are *such things as may fairly be considered essential to the decent maintenance and general comfort of a person in the social position of the defendant's wife.* But the wife has no implied authority to run into extravagance and give orders quite beyond the husband's means. The cases on the subject are numerous. It has been held that a wife may make her husband liable for the cost of exhibiting articles of the peace against him (*i*), but not of prosecuting him for an assault (*k*). So he may have to pay the cost of legal advice to the wife respecting an ante-nuptial settlement (*l*), and of successful divorce proceedings instituted against him (*m*). But he will not generally be bound to repay a person who has lent money to the woman (*n*); and if she has induced a person to contract with her by fraudulently representing herself to be unmarried, her husband will not be liable (*o*). On the other hand, in cases where the wife had really no authority to enter into a contract, the husband may by his conduct ratify and accept the responsibility of it (*p*).

(*d*) Eastland *v.* Burchell (1878), 3 Q. B. D. 432; 47 L. J. Q. B. 500.

(*e*) Mizen *v.* Pick (1838), 3 M. & W. 481; 1 H. & H. 163.

(*f*) Johnston *v.* Sumner (1858), 3 H. & N. 261; 27 L. J. Ex. 341; Clifford *v.* Laton (1827), Moo. & M. 101; 3 C. & P. 15; Dixon *v.* Hurrell (1838), 8 C. & P. 717.

(*g*) Thompson *v.* Hervey (1768), 4 Burr. 2177.

(*h*) Boulton *v.* Prentice (1745), Str. 1214; Forristall *v.* Lawson (1876), 34 L. T. 903.

(*i*) Turner *v.* Rookes (1839), 10 Ad. & E. 47; 2 P. & D. 294.

(*k*) Grindell *v.* Godmond (1836), 5 Ad. & E. 755; 1 N. & P. 168.

(*l*) Wilson *v.* Ford (1868), L. R. 3 Ex. 63; 37 L. J. Ex. 60.

(*m*) Ottaway *v.* Hamilton (1878), 3 C. P. D. 393; 47 L. J. C. P. 725.

(*n*) Knox *v.* Bushell (1857), 3 C. B. N. S. 334; *In re* Cook, *Ex parte* Vernall (1893), 10 M. B. R. 8; but see Harris *v.* Lee (1718), 1 P. Wms. 482; Prec. Ch. 502; Jenner *v.* Morris (1861), 30 L. J. Ch. 361; 3 De G. & J. 45; Deare *v.* Soutten (1869), L. R. 9 Eq. 151; 21 L. T. 523; Davidson *v.* Wood (1863), 32 L. J. Ch. 400; 1 D. J. & S. 465; Judicature Act, 1873, s. 24.

(*o*) Liverpool Adelphi Loan Ass. *v.* Fairhurst (1854), 23 L. J. Ex. 163; 19 Ex. 422; Wright *v.* Leonard (1861), 11 C. B. N. S. 258; 30 L. J. C. P. 365; and see Earle *v.* Kingscote, [1900] 2 Ch. 585; 69 L. J. Ch. 725.

(*p*) Waithman *v.* Wakefield (1807), 1 Camp. 120; 10 R. R. 654.

Mad husband.

The wife's authority to pledge her husband's credit is not greater when her husband is mad than when her husband is sane. Where, however, the husband before his insanity has held out his wife as his agent to give orders on his behalf, a tradesman who continues to supply goods by order of the wife, and in ignorance of the insanity, can recover the price of the goods against the husband (*q*).

Cohabitation.

It may be remarked that, to make the man liable on the woman's contracts, it is not necessary that the strict relationship of husband and wife should exist between them. The presumption of authority arises *whenever a man and woman are cohabiting*, if he allows her to assume his name and treats her as part of his family, and it is no answer to show that the plaintiff knew they were not married (*r*).

Blades *v.* Free.

The case of Smout *v.* Ilberry is a well-known and sometimes criticised authority (*s*). Thirteen years before, in Blades *v.* Free (*t*), it had been held that the executors were not liable in such a case.

Funeral expenses.

A husband is liable to pay the funeral expenses of his deceased wife, but in some cases he will be allowed to retain them out of her estate (*u*).

To whom was credit given?

Inasmuch as a married woman is now as capable of contracting *sui juris* as any other person, the first question to be considered when a married woman now makes a contract will be, for whom was she contracting; was it her own personal contract, or did she make it as agent only for and on behalf of her husband? That depends on the answer to the question, to whom was the credit given, *to the understanding of both parties?* The question is one of fact depending on all the circumstances of the transaction. The nature of the contract is a material element in determining the question to whom credit was given. And in the case of a wife's contract for necessaries it will still generally be presumed, in the absence of evidence to the contrary, that she contracted as agent

(*q*) Richardson *v.* Dubois (1869), L. R. 5 Q. B. 51; 39 L. J. Q. B. 69; Drew *v.* Nunn (1879), 4 Q. B. D. 661; 48 L. J. Q. B. 591.

(*r*) Watson *v.* Threlkeld (1794), 2 Esp. 637; 5 R. R. 760; Robinson *v.* Nahon (1808), 1 Camp. 245; Ryan *v.* Sams (1848), 12 Q. B. 460; 17 L. J. Q. B. 271; Munro *v.* De Chemant (1815), 4 Camp. 215.

(*s*) But see the recent case of Salton *v.* New Beeston Cycle Co., [1900] 1 Ch. 43; 69 L. J. Ch. 20, where it was held that the principle of Smout *v.* Ilberry applies to a solicitor representing a party in an action, and also to a revocation of authority by the dissolution of a company as well as by the death of an individual. On the other hand, see the judgment of Kekewich, J., in Halbot *v.* Lens, [1901] 1 Ch. 344; 70 L. J. Ch. 125.

(*t*) (1829), 9 B. & C. 167; 4 M. & R. 282. See Drew *v.* Nunn, *ubi sup.*

(*u*) *In re* M'Myn (1886), 33 Ch. D. 575; 55 L. J. Ch. 845; Bradshaw *v.* Beard (1862), 12 C. B. N. S. 344; 31 L. J. C. P. 273.

only. The wife, however, may herself incur liabilities even when contracting not for herself but as agent for her husband; in fact, it may be stated generally that she is in the same position as any other agent who is *sui juris*, and is subject to the same rights and liabilities. If, therefore, it were proved that she had no authority in fact to contract as agent for her husband, she would be liable to an action on the implied warranty of authority (or to an action for deceit, as the case might be), provided the other party was not aware that she had no authority. Her liability would, of course, in such a case be very different from what it would be if she could be sued on the contract itself; for the measure of damages for which her separate property would be liable would be the loss the other party had sustained through not having the contract performed, which might or might not be substantial.

Negotiable instruments.

The indorsement by a married woman of a negotiable instrument in her own name will probably now make her alone bound by it, even though she was acting as her husband's agent and by his authority (*x*).

Ante-nuptial contracts.

The liability of a husband for the ante-nuptial contracts of his wife has undergone considerable change owing to modern legislation, and the present law may be stated shortly as follows: (1) If the parties were married prior to August 9, 1870, the husband is liable on all contracts made by his wife *dum sola*. (2) If married between August 9, 1870, and July 30, 1874, the husband is under no liability for his wife's ante-nuptial debts. (3) If married between July 30, 1874, and January 1, 1883, the liability of the husband extends to the amount of the assets acquired by him from, or in right of, his wife. (4) If married on or after January 1, 1883, then sect. 14 of the Married Women's Property Act, 1882, provides, practically, that the husband's liability is limited to the extent of the property which he has acquired from or through his wife, after deducting any payments made by him in respect of his wife's liabilities (*y*). A husband surviving his wife is probably not liable for her ante-nuptial debts (*z*).

Torts of wife.

It may be here mentioned that a husband is subject to the same liabilities for his wife's torts committed during coverture as he was

(*x*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), ss. 23, 91 (1); and see Byles on Bills, p. 44 (15th ed.). The law relating to the contracts of married women is admirably stated and discussed in "The Law of Husband and Wife," by Montague Lush and W. H. Griffith, pp. 296—395 (2nd ed.).

(*y*) Beck *v.* Pierce (1889), 23 Q. B. D. 316; 58 L. J. Q. B. 516.

(*z*) Turner *v.* Caulfield (1879), 7 L. R. Ir. 347; Bell *v.* Stocker (1882), 10 Q. B. D. 129; 52 L. J. Q. B. 49.

previously to the Married Women's Property Act, 1882; and that he will be exempt from liability only in cases when the tort is directly connected with her contract and parcel of the same transaction, and is also the means of "effecting" (in the sense of "obtaining") the contract (*a*).

The important decision in the case of Reg. *v.* Jackson, [1891] 1 Q. B. 671; 60 L. J. Q. B. 346, may be mentioned here; the Court of Appeal decided that where a wife refuses to live with her husband, he is not entitled to keep her in confinement in order to enforce restitution of conjugal rights. Reg. *v.* Jackson.

Extent of Agent's Authority.

COX *v.* MIDLAND COUNTIES RAILWAY CO. [14]
(1849)

[3 Exch. 268; 18 L. J. Ex. 65.]

A labourer named Higgins took a ticket for the parliamentary train from Whittington near Birmingham. As he was getting in, the guard signalled the train to start, the consequence of which was that Higgins fell, and the wheels went over his leg. On being picked up he was taken to a neighbouring public-house, and Mr. Davis, the local surgeon to the company, was sent for. Mr. Davis came, pronounced it a bad case, and sent word to the station-master at Birmingham that he should like to have the assistance of Mr. Cox, the eminent hospital surgeon at Birmingham. The station-master, on receiving this message, sent for Mr. Cox, who came immediately to Whittington, and amputated the labourer's leg.

(*a*) Earle *v.* Kingscote, [1900] 2 Ch. 585; 69 L. J. Ch. 725; approving Seroka *v.* Kattenburg (1886), 17 Q. B. D. 177; 55 L. J. Q. B. 375; and following Liverpool Adelphi Loan Assoc. *v.* Fairhurst (1854), 23 L. J. Ex. 163; 19 Ex. 422; and Wright *v.* Leonard (1861), 11 C. B. N. S. 258; 30 L. J. C. P. 365.

This action was on "assumpsit for work and labour as a surgeon," and the question was whether the station-master had power to bind the company to such a contract. It was held that he had no such power. "Though it might be a benefit," said the Court, "to the master to have the damage diminished by a speedy cure if he was really liable for that damage, it would be a prejudice to him to be bound to pay if he was not; and is the servant to decide whether his master is liable or not—a man whom he has not appointed with any view to the exercise of such a discretion? We think the servant has clearly no such power. The employer of an agent for a particular purpose gives only the authority necessary for that agency under ordinary circumstances. . . . It would be a serious inconvenience to the public if the rule of law as applicable not merely to railway companies, but to all partnerships and individuals, as to the extent of authority given to an agent, were relaxed out of a compassionate feeling, which it is difficult not to entertain towards the suffering party, the present plaintiff."

General and particular agents.

Agents are of two classes, general and particular. A *general agent* is one whom his principal has placed in a certain position, and who must therefore be taken, no matter what his private instructions may be, to have authority to do all acts which are usually done by persons filling that position. A *particular agent* is one who is entrusted with a particular transaction, and must strictly pursue his instructions. A *general agent* may deviate from his instructions, and yet bind his principal (*b*): not so a *particular agent;* persons dealing with him are bound at their peril to ascertain the extent of his authority (*c*). Thus a *horse-dealer's servant* must be assumed to have authority to *warrant*, and the master will be bound although he expressly told the servant *not* to warrant; but if an ordinary

Warranty of horse.

(*b*) See the recent cases of Watteau *v.* Fenwick, [1893] 1 Q. B. 346; 67 L. T. 831; and Reid *v.* Rigby, [1894] 2 Q. B. 40; 63 L. J. Q. B. 451.

(*c*) Fenn *v.* Harrison (1790), 3 T. R. 757; East India Co. *v.* Hensley (1794), 1 Esp. 111; Levy *v.* Richardson, W. N. (1889) 25; Bryant *v.* La Banque du Peuple, [1893] A. C. 170; 62 L. J. P. C. 68.

person tells his servant to sell a horse, and not to give a warranty with it, and the servant then, in defiance of his orders, does give a warranty, it will not bind the master (*d*). So, too, if a person sends an agent to buy a horse on the terms of receiving a warranty, and the agent accepts the horse without such warranty, there is no sale to bind the principal and the horse may be returned (*e*). And in the recent case of Wright *v.* Glyn (*f*) it was held that the mere relation of master and coachman does not of itself invest the coachman with ostensible authority to pledge his master's credit for forage. But though this distinction between the powers of a general agent and those of a particular agent is perfectly clear in theory, great difficulty arises in practice, and the reader will only get a clear idea of the subject by a careful consideration of the cases.

Coachman.

Though (as we see in the leading case) a *station-master* may not, it has been held in a later case that the *general manager* of a railway company *may* pledge his masters' credit for medical expenses (*g*).

General manager of railway company.

The master of a ship may pledge the credit of his owners for most purposes incidental to the due prosecution of the voyage (*h*); but where a passenger steamer was wrecked, and by the terms of the contract with the passengers the owners were under no liability to forward them to their destination, it was recently held (*i*) that the master, who made arrangements with another vessel to carry on the passengers, did so as the agent of the passengers, and not of the owners. The general manager of a mine has no implied authority to borrow money in an emergency (*k*).

Master of ship.

Manager of mine.

A ship's husband cannot bind his owners by an agreement to cancel the charter-party (*l*).

Ship's husband.

In the case of Payne *v.* Leconfield (*m*), it was held that an

Auctioneer.

(*d*) Brady *v.* Todd (1861), 9 C. B. N. S. 592; 30 L. J. C. P. 223; Howard *v.* Sheward (1866), L. R. 2 C. P. 148; 36 L. J. C. P. 42; Baldry *v.* Bates (1885), 52 L. T. 620; but see Brooks *v.* Hassall (1883), 49 L. T. 569.

(*e*) Jordan *v.* Norton (1838), 4 M. & W. 155; 7 L. J. Ex. 281.

(*f*) [1902] 1 K. B. 745; 71 L. J. K. B. 497.

(*g*) Walker *v.* G. W. Ry. Co. (1867), L. R. 2 Ex. 228; 36 L. J. Ex. 123.

(*h*) Arthur *v.* Barton (1840), 6 M. & W. 138; 9 L. J. Ex. 187; Beldon *v.* Campbell (1851), 6 Ex. 886; 20 L. J. Ex. 342; Gunn *v.* Roberts (1874), L. R. 9 C. P. 331; 43 L. J. C. P. 233; The Pontida (1884), 9 P. D. 177; 53 L. J. P. 78; The Rhosina (1885), 10 P. D. 131; 54 L. J. P. 72.

(*i*) The Mariposa, [1896] P. 273; 65 L. J. P. 104.

(*k*) Hawtayne *v.* Bourne (1841), 7 M. & W. 595; 10 L. J. Ex. 244.

(*l*) Thomas *v.* Lewis (1878), 4 Ex. Div. 18; 48 L. J. Ex. 7; Sandeman *v.* Scurr (1866), L. R. 2 Q. B. 86; 36 L. J. Q. B. 58.

(*m*) (1882), 30 W. R. 814; 51

auctioneer selling a horse did not bind his employer by unauthorized statements which he made respecting it.

Sale of land.

An agent appointed to sell land has generally no authority to sign a contract on behalf of his principal (*n*). But it was recently held, in the case of Rosenbaum *v.* Belson (*o*), that instructions given by an owner of real estate to an agent to sell the property for him, and an agreement to pay a commission on the purchase price accepted, were an authority to the agent to make a binding contract and to sign a contract for sale. An agent has no authority to receive payment on behalf of his principal in any other mode than in cash, in the absence of express instructions or some usage to the contrary (*p*).

Payment in cash.

Authority to borrow.

Where an owner of title deeds has placed them in the hands of an agent with authority to raise money on them to a limited amount, and the agent deposits them with a *bonâ fide* lender, who has no knowledge of the limit imposed by the principal, for an amount in excess of that which he had authority to borrow, the principal cannot redeem the deeds except by payment of the full amount which the agent in fact raised upon them (*q*).

Agency of necessity.

Sometimes the law implies an authority to contract for another so as to bind him from the *necessity* of the occasion. Thus, in a case in which a man had sent a horse down from King's Cross to Sandy, but had not given any address, or told anyone to meet it, it was held that the railway company had authority to incur livery stable expenses on behalf of the owner (*r*). By the law merchant, upon the necessity of the case, any person may accept or pay a bill of exchange *supra protest* for the honour of the drawer, and may charge him with indemnity as if he had given authority to do so (*s*).

L. J. Q. B. 642; Stein *v.* Cape (1883), 1 C. & E. 63; Graves *v.* Masters (1883), 1 C. & E. 73.

(*n*) Prior *v.* Moore (1887), 3 T. L. R. 624. And see Hamer *v.* Sharp (1874), L. R. 19 Eq. 108; 44 L. J. Ch. 53; and Chadburn *v.* Moore (1892), 61 L. J. Ch. 674; 67 L. T. 257.

(*o*) [1900] 2 Ch. 267; 69 L. J. Ch. 569.

(*p*) Pape *v.* Westacott, [1894] 1 Q. B. 272; 63 L. J. Q. B. 222. And see Hine *v.* Steamship Insurance Syndicate (1895), 72 L. T. 79; 7 Asp. M. C. 558.

(*q*) Brocklesby *v.* Temperance Permanent Building Society, [1895] A. C. 173; 64 L. J. Ch. 433; approving Perry Herrick *v.* Attwood, (1851), 2 De G. & J. 21; 25 Beav. 205. And see Rimmer *v.* Webster, [1902] 2 Ch. 163; 71 L. J. Ch. 561; and Farquharson *v.* King, [1902] A. C. 325; 71 L. J. K. B. 667.

(*r*) G. N. Ry. Co. *v.* Swaffield (1874), L. R. 9 Ex. 132; 43 L. J. Ex. 89. See also Montaignac *v.* Shitta (1890), 15 App. Cas. 357; distinguished in Jacobs *v.* Morris, [1902] 1 Ch. 816; 71 L. J. Ch. 363.

(*s*) See Bills of Exchange Act, 1882, ss. 65—68.

An agent cannot generally employ a sub-agent to do the work of his agency—a rule expressed in the maxim "*Delegata potestas non potest delegari.*" There are, however, exceptions to this rule. Thus, it was recently held by the Divisional Court(*t*) that a servant has an implied authority in cases of *sudden emergency* to appoint another person to act as a servant on his master's behalf. The facts were as follows:—While the defendants' omnibus was being driven by their servant, a policeman, being of opinion that the driver was drunk, ordered him to discontinue driving. The driver and the conductor of the omnibus thereupon authorized a third person, who happened to be passing by, to drive the omnibus home on their master's behalf. That person, while so driving the omnibus home, negligently drove over the plaintiff and injured him. The defendants were held liable, and, in his judgment, Wright, J., said, "I think that in cases of sudden emergency a servant has an implied authority from his employer to act in good faith according to the best of his judgment for that employer's interests, subject to this, that in so doing he must violate no express limitation of his authority, and must not act in a manner which is plainly unreasonable." This decision, however, was reversed by the Court of Appeal(*u*), on the ground that there was *no evidence of necessity*, but Lord Esher, M. R., made the following important observation:—"I am very much inclined to agree with the view taken by Eyre, C. J., in the case of Nicholson *v.* Chapman(*x*), and by Parke, B., in the case of Hawtayne *v.* Bourne(*y*), to the effect that this doctrine of authority by reason of necessity is confined to certain well-known exceptional cases, such as those of a master of a ship, or the acceptor of a bill of exchange for the honour of the drawer." The fact that the master might have been communicated with was considered sufficient to rebut the suggestion of necessity. So, too, by usage of trade, an agent employed for a particular business is impliedly authorized to employ such qualified sub-agents as are generally required in that business; *ex. gr.*, an architect receives implied authority from those who employ him to engage a person to make calculations and take out quantities, and this person may claim remuneration from the employers of the architect, though they were unaware of his existence(*z*). But it has recently been held that on a sale by

Agent cannot employ sub-agent.

Exceptions.

Sudden emergency.

Custom.

(*t*) Gwilliam *v.* Twist, [1895] 1 Q. B. 557.
(*u*) [1895] 2 Q. B. 84; 64 L. J. Q. B. 474.
(*x*) (1793), 2 H. Bl .254; 3 R. R. 374.
(*y*) (1841), 7 M. & W. 595; 10 L. J. Ex. 244.
(*z*) Moon *v.* Witney Guardians (1837), 3 Bing. N. C. 814; 6 L. J.

auction, the auctioneer's clerk cannot, in the absence of special authority from the purchaser, fill up a memorandum on behalf of the purchaser so as to bind him, and that the exigencies of the case do not require that the auctioneer should be held entitled to delegate to his clerk the authority which he himself has to bind the purchaser by writing down his name on a copy of the particulars and conditions of sale (*a*).

The one-eyed man's case.

Knowledge obtained by an agent when he is acting within the scope of his authority will be imputed to his principal. A good illustration of this rule is furnished by the case of Bawden *v.* London, Edinburgh, and Glasgow Assurance Co. (*b*). The plaintiff effected an insurance against accidental injury with the defendants through their agent; the proposal for the insurance, which formed the basis of the contract, contained a statement by the assured that he had no physical infirmity. At the time when he signed the proposal the assured had lost the sight of one eye, a fact of which the defendants' agent was aware, though he did not communicate it to the defendants. The assured during the currency of the policy met with an accident, which resulted in the complete loss of sight in his other eye, so that he became permanently blind. It was held that the knowledge of their agent must be imputed to the defendants, and that they were consequently liable on the policy.

Ratification.

Though an agent may have exceeded his authority in such a way that his principal is not bound, still the principal may, if he pleases, ratify the unauthorized contract. *Omnis ratihabitio retrotrahitur et mandato priori æquiparatur.* But to constitute a binding ratification by a person of an act done in his name without any previous authority, there must be full knowledge on his part of the facts, and unequivocal adoption after such knowledge, or the circumstances must be such as to warrant the clear inference that the

(N. S.) C. P. 305. But, of course, in the case put the plaintiff would have clearly to *prove the custom*, and it is believed that some doubt exists on that point. See also Skinner *v.* Weguelin (1882), 1 C. & E. 12; Dew *v.* Metropolitan Ry. Co. (1885), 1 T. L. R. 358.

(*a*) Bell *v.* Balls, [1897] 1 Ch. 663; 66 L. J. Ch. 397. It was further held in this case, that when an auctioneer filled up a memorandum on behalf of the purchaser, not at the sale, but several days afterwards, his authority had ceased, and that consequently there was no memorandum in writing to satisfy the Statute of Frauds. *Quære*, whether on a sale by auction under ordinary circumstances a person to whom a lot has been knocked down can revoke the authority conferred by him on the auctioneer to sign a memorandum on his behalf at the time. *Ib.* See also Van Praagh *v.* Everidge, [1903] 1 Ch. 434; 72 L. J. Ch. 260.

(*b*) [1892] 2 Q. B. 534; 61 L. J. Q. B. 792. But see Biggar *v.* Rock Life Assurance Co., [1902] 1 K. B. 516; 71 L. J. K. B. 79, where the agent was held to be the agent of the assured, and not of the assurers.

supposed principal was adopting the acts of the supposed agent *whatever they were* (*c*). Though subsequent ratification may supply the want of authority in an agent at the time of his entering into a contract, it must be shown in such a case that there was a contract purporting to be made by and with the agent which, if the agent had authority, would be a valid binding contract (*d*). Very slight evidence of ratification is sufficient, but the principal cannot ratify part and repudiate the rest. He must take all or none (*e*). It is necessary that the agent should have professed to act as agent merely. If he purported to act on his own account there can be no ratification, even though he had an undisclosed intention at the time he entered into the contract to give the benefit of it to a third party (*f*). For this reason (amongst others) it was held that a person whose name had been forged on a promissory note could not ratify the act of the forger and accept the paternity of the document (*g*). But where an agent makes a contract purporting to sell goods in the name of a principal, but with the fraudulent intention of selling them on his own account and for his own benefit, it is competent for the principal to ratify and take the benefit of the contract as against the buyers (*h*). And if an owner of goods places them for sale in the hands of an agent, and that agent, for the purpose of implementing a price-open contract made by him, delivers those goods to the person who has made that contract with him in such a way that upon delivery the sale becomes complete, and the obligation to pay the price arises, that is just as much a sale of his principal's goods to that person, and just as much makes the purchaser liable to his principal, as if there had been no contract before the goods were delivered (*i*). It has been recently decided that an acceptance by an agent acting without authority of an option of purchase, which has to be exercised within a limited time, is not made effective by the principal's ratification after the time limited has expired (*k*).

Goods supplied to club.

Questions of agency occasionally arise with regard to goods supplied to a club. In the case of a proprietary club, no one is

(*c*) Marsh *v.* Joseph, [1897] 1 Ch. 213; 66 L. J. Ch. 128.

(*d*) See Athy Guardians *v.* Murphy (1896), 1 Ir. R. 65.

(*e*) Hovil *v.* Pack (1806), 7 East, 164; 3 Smith, 156; Hartas *v.* Ribbons (1889), 22 Q. B. D. 254; 58 L. J. Q. B. 187; Bolton *v.* Lambert (1889), 41 Ch. D. 295; 58 L. J. Ch. 425.

(*f*) Keighley, Maxsted & Co. *v.* Durant, [1901] A. C. 240; 70 L. J. K. B. 662.

(*g*) Brook *v.* Hook (1871), L. R. 6 Ex. 89; 40 L. J. Ex. 50.

(*h*) *In re* Tiedemann and Ledermann Frères, [1899] 2 Q. B. 66; 68 L. J. Q. B. 852.

(*i*) North Western Bank *v.* Poynter, [1895] A. C. 56; 64 L. J. P. C. 27.

(*k*) Dibbins *v.* Dibbins, [1896] 2 Ch. 348; 65 L. J. Ch. 724.

liable except the proprietor himself. In the case of a members' club the committee are liable, but not the other members, unless it can be shown that they individually assented to the orders given or authorized the committee to pledge their credit (*l*). The recent decision of the Privy Council in the case of Wise *v.* Perpetual Trustee Co. (*m*) will probably in future be considered the leading authority on this subject. It was there held, that an ordinary club is formed upon the tacit understanding, judicially recognised, that no member as such becomes liable to pay to its funds or otherwise any money beyond the subscriptions required by its rules. A club which is governed by rules prescribing the amount of the annual subscription, but not containing any provision for the amendment or alteration thereof, cannot by a resolution passed by a majority of the members present at a general meeting raise the amount of the subscription so as to bind existing members, and the Court will interfere by injunction to restrain the expulsion of a dissentient member for refusing to pay the increased subscription (*n*). So, too, an individual member of an officers' mess, who has in no way pledged the credit of the mess, is not personally liable for goods supplied to the mess by the orders of the wine caterer (*o*).

Wise *v.* Perpetual Trustee Co.

Oxford and Cambridge University Club case.

Lawyers.

A word may be said here about the authority of legal advisers. Besides the conduct of formal proceedings, a solicitor retained in an action has a general authority to act for his client in matters of discretion within his province. He can, for instance, waive irregularities, and can refer or compromise an action (*p*); but if he is retained to bring an action, he has no implied authority to compromise the claim before action brought (*q*). A solicitor stands on a different footing from a barrister, because if he goes wrong, he can be sued for his negligence or unskilfulness, while a barrister cannot. The great cases of Swinfen *v.* Swinfen (*r*), and Swinfen *v.* Lord Chelmsford (*s*), should be consulted on the whole of this subject (*t*).

(*l*) Cullen *v.* Queensbury (1787), 1 Br. P. C. 396; Flemyng *v.* Hector (1836), 2 M. & W. 172; 6 L. J. Ex. 43; Todd *v.* Emly (1841), 7 M. & W. 427; 8 M. & W. 505; 10 L. J. Ex. 161, 262; Parr *v.* Bradbury (1885), 1 T. L. R. 525; Overton *v.* Hewett (1886), 3 T. L. R. 246; Steele *v.* Gourley, W. N. (1887) 147; 3 T. L. R. 772; Barnett *v.* Wood (1888), 4 T. L. R. 278; Pilot *v.* Craze (1888), 52 J. P. 311; 4 T. L. R. 453.

(*m*) [1903] A. C. 139; 72 L. J. P. C. 31. See, however, a criticism of this decision in *The Law Quarterly Review*, 1903, p. 386.

(*n*) Harington *v.* Sendall, [1903] 1 Ch. 921; 72 L. J. Ch. 396.

(*o*) Hawke *v.* Cole (1890), 62 L. T. 658.

(*p*) See *In re* Newen, Carruthers *v.* Newen, [1903] 1 Ch. 812.

(*q*) Macaulay *v.* Polley, [1897] 2 Q. B. 122; 66 L. J. Q. B. 665.

(*r*) (1857), 1 C. B. N. S. 364; 26 L. J. C. P. 97.

(*s*) (1860), 5 H. & N. 890; 29 L. J. Ex. 382.

(*t*) See also the recent case of

Responsibility of Principal for Fraud of Agent.

BARWICK *v.* ENGLISH JOINT STOCK BANK. [15]
(1867)

[L. R. 2 Ex. 259; 36 L. J. Ex. 147.]

In this case, the plaintiff having for some time, on a guarantee of the defendants, supplied a customer of theirs named Davis with oats on credit, for carrying out a government contract, refused to continue to do so unless he had a better guarantee. The defendants' manager thereupon gave him a written guarantee to the effect that the customer's cheque on the bank in plaintiff's favour, in payment for the oats supplied, should be paid, on receipt of the government money, in priority to any other payment, "except to this bank." Davis was then indebted to the bank to the amount of 12,000*l.*, but this fact was not known to the plaintiff, nor was it communicated to him by the manager. The plaintiff thereupon supplied the oats to the value of 1,227*l.*; the government money, amounting to 2,676*l.*, was received by Davis, and paid into the bank; but Davis's cheque for the price of oats drawn on the bank in favour of the plaintiff was dishonoured by the defendants, who claimed to retain the whole sum of 2,676*l.* in payment of Davis's debt to them. The plaintiff thereupon brought an action for false representation and for money had and received. The Court of Exchequer Chamber (Willes, Blackburn, Keating, Mellor, Montague Smith, and Lush, JJ.) held that there was evidence to go to the jury that the manager knew and intended that the

Neale *v.* Gordon-Lennox, [1902] A. C. 465; 71 L. J. K. B. 939; and Strauss *v.* Francis (1865), L. R. 1 Q. B. 379; 35 L. J. Q. B. 133.

guarantee should be unavailing, and fraudulently concealed from the plaintiff the fact which would make it so, and that the defendants would be liable for such fraud in their agent. The question whether the plaintiff could have recovered under the count for money had and received was not decided.

In delivering the unanimous judgment of the Court, Willes, J., said: "With respect to the question whether a principal is answerable for the act of his agent in the course of his master's business and for his master's benefit, no sensible distinction can be drawn between the case of fraud and the case of any other wrong. The general rule is, that *the master is answerable for every such wrong of the servant or agent as is committed in the course of the service and for the master's benefit, though no express command or privity of the master be proved* (*u*). That principle is acted upon every day in running down cases. It has been applied also to direct trespass to goods, as in the case of holding the owners of ships liable for the act of masters abroad improperly selling the cargo (*x*). It has been held applicable to actions of false imprisonment, in cases where officers of railway companies, intrusted with the execution of bye-laws relating to imprisonment and intending to act in the course of their duty, improperly imprison persons who are supposed to come within the terms of the bye-laws (*y*). It has been acted upon where persons employed by the owners of boats to navigate them and to take fares have committed an infringement of a ferry, or such like wrong (*z*). In all these cases it may be said, as

(*u*) See Laugher *v.* Pointer (1826), 5 B. & C. at p. 554; 4 L. J. K. B. 309.

(*x*) Ewbank *v.* Nutting (1849), 7 C. B. 797.

(*y*) Goff *v.* G. N. Ry. Co. (1861), 3 E. & E. 672; 30 L. J. Q. B. 148, explaining (at 3 E. & E. p. 683) Roe *v.* Birkenhead Ry. Co. (1851), 7 Ex. 36; and see Barry *v.* Midland Ry. Co. (1865), Ir. L. Rep. 1 C. L. 130.

(*z*) Huzzey *v.* Field (1835), 2 C. M. & R. 432, at p. 440; 41 R. R. 755.

it was here, that the master has not authorised the act. *It is true he has not authorised the particular act, but he has put the agent in his place to do that class of acts, and he must be answerable for the manner in which the agent has conducted himself in doing the business which it was the act of his master to place him in.*"

The rule laid down in the leading case as to the liability of an innocent principal for the fraud of his agent has been accepted and acted upon in many subsequent cases, and may now be treated as established law (*a*). It was fully approved of in Mackay *v.* Commercial Bank of New Brunswick (*b*), and Swire *v.* Francis (*c*). In Houldsworth *v.* Glasgow Bank (*d*), Lord Selborne considered it to be a well recognized principle of the law of agency, but added: "The manner in which the master is to be answerable, and the nature and extent of the remedies against him, may vary according to the nature and circumstances of particular cases."

The following cases may be referred to as illustrations of the law relating to the liability of a principal for his agent's fraud, namely:—Udell *v.* Atherton (1861), 7 H. & N. 172; 30 L. J. Ex. 337; Blake *v.* Albion Life Assurance Society (1878), 4 C. P. D. 94; 48 L. J. Q. B. 169; Weir *v.* Bell (1878), 3 Ex. Div. 238; 47 L. J. Q. B. 704; Chapleo *v.* Brunswick Building Society (1881), 6 Q. B. D. 696; 50 L. J. Q. B. 372; Mullens *v.* Miller (1883), 22 Ch. D. 194; 52 L. J. Ch. 380; Baldry *v.* Bates (1885), 52 L. T. 620; and Hirst *v.* West Riding Union Banking Co., [1901] 2 K. B. 560; 70 L. J. K. B. 828; where it was held (following Swift *v.* Jewsbury (1874), L. R. 9 Q. B. 301; 43 L. J. Q. B. 56) that a company incorporated under the Companies Acts is a "person" within the meaning of section 6 of 9 Geo. 4, c. 14, and consequently is not liable for a fraudulent representation as to the credit of another person not signed by it, but made by its agent acting within the scope of its authority, although the representation is in writing signed by the agent and is made in the interest of the company.

The rule, however, is subject to this qualification, that a principal is not liable for the fraud of his agent committed, not for the principal, but for the agent's own purposes (*e*). Limit of principle.

(*a*) See Smith's L. C. 10th ed. p. 88.

(*b*) (1874), L. R. 5 P. C. 394; 43 L. J. P. C. 31.

(*c*) (1877), 3 App. Cas. 106; 47 L. J. P. C. 18.

(*d*) (1880), 5 App. Cas. at p. 326; 42 L. T. 194.

(*e*) See Thorne *v.* Heard, [1895] A. C. 495; 64 L. J. Ch. 652; and

A false statement made by an agent with his principal's express authority, the principal knowing it to be false, is obviously equivalent to a falsehood told by the principal himself; nor can it make any difference as against the principal whether the agent knows the statement to be false or not.

But the case may arise, where the statement may be not known to the agent to be untrue, and not expressly authorised by the principal, the true state of facts being, however, known to the principal. Such a case occurred in Cornfoot *v.* Fowke (*f*), where the facts were as follows:—The plaintiff (the owner of a ready-furnished house) had employed an agent to let it for him, and the agent had let it to the defendant. The adjoining house was used as a brothel, and this fact was known to the plaintiff, but not to the agent. Before the agreement to take the house was signed by the defendant, he had asked the agent whether there was any objection to the house, and he had answered that there was not. The action was brought against the defendant for the non-performance of his agreement, and he pleaded that he had been induced to enter into the contract by the fraud of the plaintiff. The Court of Exchequer decided against the defendant. "I think it impossible," said Alderson, B., "to sustain a charge of fraud when neither principal nor agent has committed any: the principal because, though he knew the fact, he was not cognisant of the misrepresentation being made, nor even directed the agent to make it; and the agent, because, though he made a misrepresentation, yet he did not know it to be one at the time he made it, but gave his answer *bonâ fide*." Lord Abinger, C. B., however, in a learned and exhaustive judgment, dissented from the view of the majority, saying that it was "a matter that appeared to him, but for their opinion, too plain to admit of a doubt"; and held that the contract being procured by misrepresentation must be tainted with legal, if not moral, fraud. In the leading case, Willes, J., said: "I should be sorry to have it supposed that Cornfoot *v.* Fowke turned upon anything but a point of pleading"; and few cases have excited more animated discussion. It is believed that the case will some day be overruled in favour of the view then unsuccessfully contended for, and of the principle that if a man, having no knowledge whatever on the subject, takes on himself to represent a certain state of facts to exist, he does so at his peril (*g*). The more recent

Cornfoot *v.* Fowke.

British Mutual Bank *v.* Charnwood Forest Ry. Co. (1887), 18 Q. B. D. 714; 56 L. J. Q. B. 449.

(*f*) (1840), 6 M. & W. 358; 4 Jur. 919.

(*g*) See Fuller *v.* Wilson (1842), 3 Q. B. 58; 2 G. & D. 460; Derry *v.* Peek (1889), 14 App. Cas. 337; 58 L. J. Ch. 864.

case of Ludgater *v.* Love (*h*) (where the principal's son innocently said what his father told him to say about the condition of some sheep he was selling) is undoubtedly another nail in the coffin of Cornfoot *v.* Fowke; but the two cases are to be distinguished on the ground that in the former case the jury expressly found that the defendant *fraudulently concealed from his son* that the sheep had the rot, with a view to his representing them as sound and getting the best price for them (*i*). Ludgater *v.* Love.

"The party who has been induced to enter into a contract by fraud, or by concealment or misrepresentation in any matter such that the truth of the representation made, or the disclosure of the fact, is by law or by special agreement of the parties of the essence of the contract, may affirm the contract, and insist, if that is possible, on being put in the same position as if the representation had been true. Or he may at his option rescind the contract, and claim to be restored, so far as may be, to his former position within a reasonable time after discovering the misrepresentation, unless it has become impossible to restore the parties to the position in which they would have been if the contract had not been made, or unless any third person has in good faith and for value acquired any interest under the contract" (*k*). As to rights of party misled.

Wherever an agent may have an adverse interest to that of his principal, he is bound to disclose not merely the fact that he has such an interest, but he is bound also to state its exact nature (*l*). Thus in Rothschild *v.* Brookman (*m*), the Court set aside certain sales and purchases effected by Messrs. Rothschild on the ground that, while they were employed to sell their clients' French rents, they bought them themselves, and when employed to buy Prussian bonds, allotted him some which they themselves held. Principal and agent *inter se.*

An agent is not allowed to make a surreptitious profit out of his agency, but must account to his employer for everything he receives. Thus it was held, in Skelton *v.* Wood (*n*), that a broker is not entitled to recover from his principal differences in stock Bribes to agents.

(*h*) (1881), 44 L. T. 694; 45 J. P. 600. See Blackburn *v.* Vigors (1887), 12 App. Cas. 531; 57 L. J. Q. B. 114; Blackburn *v.* Haslam (1888), 21 Q. B. D. 144; 57 L. J. Q. B. 479.

(*i*) See, further, on this point, Smith's L. C. (10th ed.) p. 81 *et seq.*; and per Lord Cranworth in National Exchange Co. *v.* Drew (1856), 2 Macq. 103.

(*k*) Pollock on Contracts (7th ed.), p. 576; and see Oakes *v.* Turquand (1867), L. R. 2 H. L. 346, 375, 376; Rawlins *v.* Wickham (1858), 3 De G. & J. 304, 322; 28 L. J. Ch. 188. See also Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 24.

(*l*) Dunne *v.* English (1874), L. R. 18 Eq. 524; 31 L. T. 75.

(*m*) (1831), 5 Bligh, N. S. 165; 30 R. R. 147. See also Gillett *v.* Peppercorn (1839), 3 Beav. 78; Kimber *v.* Barber (1873), L. R. 8 Ch. 56; 27 L. T. 526.

(*n*) (1895), 71 L. T. 616; 15 Rep. 130; and see Bulfield *v.* Fournier (1895), 15 Rep. 176.

which he purports to carry over on his behalf, when there is no existing contract between such broker and any third party available for the principal at the time when such differences arise. And reference should be made to the recent case of Erskine *v.* Sachs (*o*) as to the strictness of the rule as to the liability of agents to account for any profits they may make. Nor can an agent maintain an action to recover such illegal profit or commission from the person who has promised it him. Moreover, if I discover that my agent is selling me to the other side in this way—no matter how many trade customs can be produced in support of such dishonesty—I am generally entitled to rescind the contract. A good illustration of this rule is to be found in the recent case of Shipway *v.* Broadwood (*p*). The defendant agreed to purchase a pair of horses from the plaintiff, provided they were passed as sound by a veterinary surgeon who was employed by the defendant to examine them. The horses were certified as sound by the veterinary surgeon, and the defendant sent a cheque for the price. The horses were delivered and found to be unsound, and thereupon they were returned and the cheque stopped. In the course of the trial of an action on the cheque it was elicited that the veterinary surgeon had accepted a bribe from the plaintiff. The Court of Appeal held that it was *immaterial to inquire what effect the bribe had on the mind of the defendant's agent*, that the offer and acceptance invalidated the certificate, and that the plaintiff could not recover under the contract, which depended on the validity of the certificate. See, on this subject, the cases of Panama, &c. Co. *v.* Indiarubber, &c. Co. (1875), L. R. 10 Ch. 515; 45 L. J. Ch. 121; Harrington *v.* Victoria Graving Dock Co. (1878), 3 Q. B. D. 549; 47 L. J. Q. B. 594; Williamson *v.* Barbour (1878), 9 Ch. D. 529; 50 L. J. Ch. 147; Bagnall *v.* Carlton (1877), 6 Ch. D. 371; 47 L. J. Ch. 30; Metropolitan Bank *v.* Heiron (1880), 5 Ex. D. 319; 43 L. T. 676; Lister *v.* Stubbs (1890), 45 Ch. D. 1; 59 L. J. Ch. 570; Salford Corporation *v.* Lever, [1891] 1 Q. B. 168; 60 L. J. Q. B. 39; Grant *v.* Gold Exploration Syndicate, [1900] 1 Q. B. 233; 69 L. J. Q. B. 150; and Andrew *v.* Ramsey (1903), 72 L. J. K. B. 865.

Erskine *v.* Sachs.

Shipway *v.* Broadwood.

Directors. As to secret profits received by a director of a company, see Archer's case, [1892] 1 Ch. 322; 61 L. J. Ch. 129; and *Re* Newman & Co., [1895] 1 Ch. 674; 64 L. J. Ch. 407.

Public Bodies Corrupt Practices Act, 1889. Both the giving and receiving of a bribe is, in respect to members or servants of public bodies, a misdemeanour, and punishable by imprisonment with hard labour and fine, under the Public Bodies Corrupt Practices Act, 1889 (53 & 54 Vict. c. 69).

(*o*) [1901] 2 K. B. 504; 70 L. J. K. B. 978.

(*p*) [1899] 1 Q. B. 369; 68 L. J. Q. B. 360.

Undisclosed Principals, &c.

PATERSON *v.* GANDASEQUI. (1812) [16]

[15 East, 62; 13 R. R. 345.]

Gandasequi, a Spanish merchant, commissioned Larrazabal and Co., agents in the City, to buy a quantity of goods for him. Larrazabal and Co. asked Paterson and Co., a hosiery firm, to send certain specified articles with terms and prices. Now Paterson and Co. knew Larrazabal and Co., and had perfect confidence in them, but Gandasequi they did not know, and had no confidence in. Therefore, though they sent the goods, and though they knew perfectly well that they were really for Gandasequi, and that Larrazabal and Co. were merely his agents in the matter, yet for all that they booked the goods as sold to Larrazabal and Co. This was unfortunate, because it happened that Gandasequi was really a more substantial person than his agents, who shortly afterwards became bankrupt. Paterson and Co. thereupon sued Gandasequi for the price of the goods delivered.

But it was held that, if the seller of goods knows that the person he deals with is only an agent, *and knows also who his principal is*, and in spite of that knowledge chooses to give the credit to the agent, he must stand by his choice, and cannot sue the principal.

DAVENPORT *v.* THOMSON. (1829) [17]

[9 B. & C. 78; 7 L. J. K. B. 134.]

A person named McKune carried on at Liverpool the business of a "general Scotch agent." One day he re-

ceived a letter from some clients of his in Scotland to the following purport:—

"*Dumfries, 29th March*, 1823.

"*Dear Sir,—Annexed is a list of goods which you will please procure and ship per* Nancy. *Memorandum of goods to be shipped:—Twelve crates of Staffordshire ware, crown window glass, ten square boxes, &c., &c.*

"*Yours, &c.,*

"THOMSON AND CO."

On receiving this letter, McKune went to Davenport and Co., who were glass and earthenware dealers. He said he had received an order to purchase some goods for some clients in Scotland, *but he did not mention their name*, and the Davenports did not ask for it. They sold about 200*l.* worth of goods and debited McKune, though they knew he was only an agent. Then McKune failed without having paid Davenport and Co.

This was an action by Davenport and Co. against McKune's principal, Thomson and Co., who denied their liability on the ground that Davenport and Co. had debited McKune, and could therefore look only to him for payment. This view, however, was not adopted by the Court, and Thomson and Co. were ordered to pay, the principle being that, *as the name of the real buyer had not been disclosed to them by the agent, the sellers had had no opportunity of writing him down as their debtor.*

When a contract is made by an agent acting for a principal, the question arises whether, in relation to the other party, the agent, or the principal, or both are contracting parties, liable to be sued and entitled to sue upon the contract. The chief rules relating to the matter are these:—

Three cardinal rules.

1. If you contract with a man whom you know to be an agent, and who names his principal to you at the time of the contract, there is *primâ facie* no contract at all with the agent. The principal is the proper person to sue and to be sued. Thus in Ellis *v.*

Goulton (*q*), on the sale of premises by auction, the purchaser paid a deposit to the vendor's solicitor as agent for the vendor; the sale went off through the default of the vendor, and the purchaser brought an action to recover the deposit from the solicitor; but it was held that the action could not be maintained, as the payment of the deposit to the solicitor was equivalent to payment to the vendor, and therefore the action should have been brought against the latter. Of course the agent may, if he chooses, render himself liable as a contracting party, or there may from the very nature of the case be also a remedy against him, as where he himself has an interest in the subject-matter of the contract. And it may be, as we have seen, that credit may be given to the agent, and to the agent alone, to the exclusion of all remedy against the principal.

Foreign merchant buying goods in England through agent.

There is, however, an exception to the general rule, founded on public convenience of mercantile usages, namely, that where a merchant abroad buys goods in England through an agent, the seller, in the absence of evidence of express authority to the agent to pledge his foreign constituent's credit, *contracts with the agent*, and there is no contract or privity between him and the foreign principal (*r*). But the application of this rule may be excluded by circumstances which establish a privity between the foreign and English principals, as, for instance, was the case in Malcolm *v.* Hoyle (*s*).

Indentures.

There may also be noticed a technical rule that those persons only can sue or be sued upon an indenture who are described in it as parties thereto (*t*). And, in consequence of this rule, it is immaterial that the persons named and executing as parties are described to be, and act as, agents for others who are named as their principals: for the principal can acquire no right, nor incur liability, unless himself named or designated as a party to the deed, and unless it is executed on his behalf with authority under seal (*u*).

Bills of exchange.

So, too, as no person is liable as drawer, indorser, or acceptor of a bill of exchange who has not signed it as such (*x*), a principal

(*q*) [1893] 1 Q. B. 350; 62 L. J. Q. B. 232.

(*r*) Hutton *v.* Bulloch (1874), L. R. 9 Q. B. 572; 30 L. T. 648; Die Elbinger, &c. *v.* Claye (1873), L. R. 8 Q. B. 313; 42 L. J. Q. B. 151.

(*s*) (1894), 63 L. J. Q. B. 1; and see Crossley *v.* Magniac, [1893] 1 Ch. 594; 67 L. T. 798.

(*t*) Southampton *v.* Brown (1827), 6 B. & C. 718; 5 L. J. K. B. 252.

(*u*) Schack *v.* Anthony (1813), 1 M. & S. 573; Gardner *v.* Lachlan (1838), 8 Sim. 123; 4 M. & Cr. 129; Berkeley *v.* Hardy (1826), 5 B. & C. 355; 4 L. J. K. B. 184; *In re* Pickering's claim (1871), L. R. 6 Ch. 525; affirming 24 L. T. 178.

(*x*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 23; and see *Re* Adansonia Fibre Co. (1874), L. R. 9 Ch. 635; 43 L. J. Ch. 732.

cannot be sued on a bill signed by his agent in his own name; but if an agent has signed a bill in the name of his principal by or under the latter's authority, the principal is alone liable to be sued on the bill (*y*). But "where a person signs a bill as drawer, indorser, or acceptor, and adds words to his signature indicating that he signs for or on behalf of a principal, or in a representative character, he is not personally liable thereon; but the mere addition to his signature of words describing him as an agent, or as filling a representative character, does not exempt him from personal liability" (*z*). This section somewhat modifies the rigour of the common law rule. At any rate, the older cases must be examined carefully with the words of the section. The principle is this, the terms "agent," "manager," &c. attached to a signature, are regarded as mere *designatio personæ*. The rule is applied with peculiar strictness to bills, because of the non-liability of the principal. "Is it not a universal rule," says Lord Ellenborough, "that a man who puts his name to a bill of exchange thereby makes himself personally liable, unless he states upon the face of the bill that he subscribes it for another or by procuration of another, which are words of exclusion? Unless he says plainly, 'I am the mere scribe,' he is liable" (*a*).

2. When you deal with a man whom you know to be an agent, but who does not name his principal to you at the time of the contract, the agent is *primâ facie* liable on the contract as well as the principal, since you cannot be expected to give credit exclusively to a person whose very name is unknown to you. But where it clearly appears on the face of the contract that the agent is not pledging his personal credit, although he may not disclose the name of his principal, still upon a contract so framed the agent could not be personally liable. Evidence of custom would, however, be admissible (*b*) to show that it was intended that the agent should himself be bound. Thus, where a charter-party was expressed to be made (*c*) between the plaintiffs and the defendants "as agents to merchants," and the defendants' signature to the

Evidence of custom admissible to charge agent.

(*y*) Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 91 (1).

(*z*) *Ib.* s. 26 (1). And "in determining whether the signature is that of the principal or that of the agent by whose hand it is written, the construction most favourable to the validity of the instrument shall be adopted." Sect. 26 (2).

(*a*) Leadbitter *v.* Farrow (1816), 5 M. & S. at p. 349: 17 R. R. 345; and see Chalmers on Bills of Exchange, p. 78 (5th ed.).

(*b*) Humfrey *v.* Dale (1867), E. B. & E. 1004; 26 L. J. Q. B. 137; Pike *v.* Ongley (1887), 18 Q. B. D. 708; 56 L. J. Q. B. 373.

(*c*) Hutchinson *v.* Tatham (1873), L. R. 8 C. P. 482; 42 L. J. C. P. 260; Hutcheson *v.* Eaton (1884), 13 Q. B. D. 861; 51 L. T. 846.

contract was expressed to be by them "as agents to merchants," evidence was tendered on the part of the plaintiffs, and admitted, of a trade usage that, if the principal's name is not disclosed within a reasonable time after the signing of the charter-party, in such case the brokers shall be personally liable. Evidence, however, would not have been admitted to prove a custom that the defendant should be liable under all circumstances, inasmuch as that would be to contradict the document itself, and not merely to add a term which is not inconsistent with any term of the contract (*d*).

Signing without qualification.

When a man signs a contract in his own name without any qualification, even although in the body of the document there may be some expressions tending to show that he is acting for another, he must nevertheless be taken to have intended to bind himself as principal (*e*). In order to exempt himself he must make it appear clearly (*f*) on the face of the contract that he did not intend to be liable as a principal.

Liability of receivers.

As to the personal liability on contracts of a receiver appointed under a debenture trust deed, see Owen *v.* Cronk (*g*), and of a receiver appointed by the Court, see Burt *v.* Bull (*h*); and the important case of Gosling *v.* Gaskell (*i*), where the House of Lords laid down the law as to the liability of trustees for debenture holders for goods ordered by a receiver appointed by them.

Agent may limit his responsibility.

But the agent may limit his responsibility by the insertion of special provisions. Thus, in a well-known case (*k*), a charter-party was executed by one Yglesias, as agent for the freighter, and his signature was unqualified, but the instrument contained a proviso that the agent's liability should cease as soon as the cargo was shipped. The Court held that Yglesias was the contracting party and liable upon the contract, but that, nevertheless, it was quite competent for him to say, "I am making this contract for an unknown principal, and I will not be liable after the cargo is shipped."

3. When you deal with a man who, though really an agent, is not known by you to be such at the time that you enter into the

(*d*) See Barrow *v.* Dyster (1884), 13 Q. B. D. 635; 51 L. T. 573.

(*e*) Paice *v.* Walker (1870), L. R. 5 Ex. 173; 39 L. J. Ex. 109; Southwell *v.* Bowditch (1876), 1 C. P. D. 374; 45 L. J. C. P. 630; McCollin *v.* Gilpin (1880), 6 Q. B. D. 516; 49 L. J. Q. B. 558.

(*f*) Hough *v.* Manzanos (1879), 4 Ex. Div. 104; 48 L. J. Ex. 398; and see Ogden *v.* Hall (1879), 40 L. T. 751.

(*g*) [1895] 1 Q. B. 265; 64 L. J. Q. B. 288.

(*h*) [1895] 1 Q. B. 276; 64 L. J. Q. B. 232.

(*i*) [1897] A. C. 575; 66 L. J. Q. B. 848.

(*k*) Oglesby *v.* Yglesias (1858), E. B. & E. 930; 27 L. J. Q. B. 356; and see Lilly *v.* Smales, [1892] 1 Q. B. 456; 40 W. R. 541.

contract, the undisclosed principal is, as a rule, bound by the contract (*l*), and entitled to enforce it as well as the agent with whom you made the contract in the first instance. But if you determine to sue the principal on the contract, you must make your election to do so within a reasonable time after discovering that there was really a principal behind the scenes (*m*), otherwise you will be estopped from pursuing any remedy except that against the agent with whom you originally contracted. So, too, if you deal with the agent so as to lead the principal to believe that the agent only will be held liable, and thus prejudice the principal in his relations with his agent (*n*).

Election within reasonable time after discovery.

Agent contracting distinctly as if principal. Humble *v.* Hunter.

It should, moreover, be noticed that where an agent has contracted in such terms as to lead anyone to suppose that he was himself the true and only principal, the principal cannot come forward and take advantage of the contract made for him by his agent. In one case (*o*) a widow brought an action on a charter-party for freight, &c. She was the owner of a ship called the *Ann*. But on the production of the charter-party it appeared that her son, who had acted as her agent in the making thereof, had signed an agreement running thus: "It was mutually agreed between C. T. Humble, Esq., owner of the good ship or vessel called the *Ann*, and Jameson Hunter," &c. It was held that, as the document itself described the son as "owner," the plaintiff must be considered as bound by this assertion of title to the subject-matter of the contract, and that she could not take the benefit of the contract.

There are dicta contained in the judgments in Davenport *v.* Thomson which suggest in the widest terms that a seller is not entitled to sue the undisclosed principal on discovering him, if in the meantime the state of account between the principal and the agent has been altered to the prejudice of the principal. But a more accurate statement of the law is contained in the judgment of Parke, B., in Heald *v.* Kenworthy (*p*). "If the conduct of the seller would make it unjust for him to call upon the buyer for the money, as, for example, where the principal is induced by the conduct of the seller to pay his agent the money, on the faith that the agent and the seller have come to a settlement on

Heald *v.* Kenworthy.

(*l*) See Watteau *v.* Fenwick, [1893] 1 Q. B. 346; 67 L. T. 831.

(*m*) Smethurst *v.* Mitchell (1859), 1 E. & E. 622; 28 L. J. Q. B. 241; Curtis *v.* Williamson (1874), L. R. 10 Q. B. 57; 44 L. J. Q. B. 27.

(*n*) Wyatt *v.* Hertford (1802), 3 East, 147; Irvine *v.* Watson (1880), 5 Q. B. D. 414; 49 L. J. Q. B. 239.

(*o*) Humble *v.* Hunter (1848), 12 Q. B. 310; 17 L. J. Q. B. 350.

(*p*) (1855), 10 Ex. 739; 24 L. J. Ex. 76.

the matter; or if any representation to that effect is made by the seller, either by words or conduct, the seller cannot afterwards throw off the mask and sue the principal." This was the view adopted by the Court of Appeal in a case (*q*) where the defendants had employed Conning, a broker, to buy oil for them. The broker accordingly bought of the plaintiffs, informing them at the time of the sale that he was buying for principals, though he did not tell them who these principals were. The terms of the sale were "cash on or before delivery," *but there is no invariable custom in the trade to insist on prepayment.* The oil was delivered to Conning by the plaintiffs, but not paid for, and the defendants, not knowing that the plaintiffs had not been paid, paid Conning the amount due for the oil. It was held that the fact of the defendants having paid the broker did not preclude the plaintiffs from suing for the price, unless, before such payment, they had by their conduct induced the defendants to believe that they had already been paid by the broker. And the Court considered that under the circumstances the man's omission to insist on prepayment was not such conduct as would reasonably induce such belief. So, in the case of Davison *v.* Donaldson (*r*), where the action was brought against a part owner of a ship for the price of beef and stores for the ship supplied on the order of a man named Tate, who was ship's husband and managing owner, the defendant was held liable, although several years had elapsed, during which the plaintiff had applied to Tate for payment, and the defendant had more than once settled accounts with Tate. "I think," said Bowen, L. J., "that the plaintiff must succeed, on the ground that there was *no misleading conduct.*"

Irvine *v.* Watson.

Davison *v.* Donaldson.

Set-Off against Factor's Principal.

GEORGE *v.* CLAGETT. (1797) [18]

[7 T. R. 359; 2 Esp. 557.]

Messrs. Rich and Heapy carried on business in woollen cloths, not only on their own account, but also as factors for other people; and as they carried on all their business

(*q*) Irvine *v.* Watson, *ubi sup.*
(*r*) (1882), 9 Q. B. D. 623; 47 L. T. 564.

at the same warehouse, it would not be obvious when they were acting as principals and when as agents. Messrs. Rich and Heapy happened to have in their possession as factors a large quantity of goods belonging to Mr. George, a clothier of Frome, which goods were in their warehouse along with goods belonging to themselves. Messrs. Clagett were in want of such goods. They held a bill of exchange for 1,200*l.*, accepted by Rich and Heapy, and as they saw no likelihood of getting paid, they thought it would not be a bad plan to buy goods from them on credit, and deduct the amount of the bill from the purchase-money. Messrs. Rich and Heapy, accordingly, sold them a quantity of goods, making out a bill of parcels for the whole in their own names, and Messrs. Clagett fully believed that they were dealing with principals. The goods were taken out of one general mass in the warehouse, so that a large portion of them really belonged to the clothier of Frome.

This was an action by that person against Messrs. Clagett for the price of the portion of the goods which belonged to him, and which he said Messrs. Rich and Heapy had sold as his agents. Messrs. Clagett said they did not know that Rich and Heapy were his agents or anybody else's agents, and claimed to have the same right of set-off (that is to say, of deducting the above-mentioned debt) against him which they would have had against them. In this contention they were successful.

Principle of leading case.

"In all these cases of set-off," said Wilde, C. J., in a later case (*s*), "the law endeavours to meet the real honesty and justice

(*s*) Fish *v.* Kempton (1849), 7 C. B. 687; 18 L. J. C. P. 206; and see the cases of Maspons *v.* Mildred, 8 App. Cas. 874; 53 L. J. Q. B. 33; and Montagu *v.* Forwood, [1893] 2 Q. B. 350; 69 L. T. 371; where it was held that the principle of George *v.* Clagett applied in favour of a person employed by an agent in his own name to collect money due to the principal, so that, having collected the money,

of the case. Where goods are placed in the hands of a factor for sale, and are sold by him under circumstances that are calculated to induce, and do induce, a purchaser to believe that he is dealing with his own goods, the principal is not permitted afterwards to turn round and tell the vendee that the character he himself has allowed the factor to assume did not really belong to him. The purchaser may have bought for the express purpose of setting off the price of the goods against a debt due to him from the seller."

These words put the rule and its reason very clearly. And Wilde, C. J., goes on,—

"But the case is different where the purchaser has notice at the time that the seller is acting merely as the agent of another. In that case there would be no honesty in allowing the purchaser to set off a bad debt at the expense of the principal" (*t*).

Cooke *v.* Eshelby.

In the case of Cooke *v.* Eshelby (*u*), the buyer admitted that he had no belief, one way or the other, whether the person who sold to him was acting on his own account or for a principal (the fact being, that the seller was in the habit of dealing both for principals and on his own account, and on the occasion in question was selling on behalf of an undisclosed principal), and it was held that he could not set off a debt due from the agent in an action by the principal for the price of the goods. "The ground upon which all these cases have been decided," said Lord Halsbury, "is that an agent has been permitted by the principal to hold himself out as the principal, *and that the person dealing with the agent has believed that the agent was the principal, and has acted on that belief.*"

Means of knowing does not amount to actual knowledge.

As to this last point, the effect of the decisions seems to be, that although the defendant had the *means of knowing* that he was dealing with an agent, and did not make use of them, he is still entitled to his right of set-off. But, of course, the fact that a man has ready to hand the *means of knowing* a thing is evidence, to some extent (*x*), that he *actually does know* it.

Mutual credit.

We see, then, that if a factor sells goods as his own, and the buyer knows nothing of any principal, the buyer may set off against the concealed principal any demand he might have set off against the factor. But it has been held, where the factor has meanwhile become bankrupt, that a mutual credit not amounting to ordinary set-off cannot be set up in an action brought by the

he was entitled to set off a debt due to him from the agent against the claim of the principal for the money collected.

(*t*) See Blackburn *v.* Mason (1893), 4 R. 297; 68 L. T. 510.

(*u*) (1887), 12 App. Cas. 271; 56 L. J. Q. B. 505.

(*x*) Borries *v.* Imp. Ott. Bank (1873), L. R. 9 C. P. 38; 43 L. J. C. P. 3.

unknown principal against the buyer (*y*); that is to say, that the mutual credit clauses of the bankrupt law do not apply as against the principal. This decision has been thought to establish that the principle of George *v.* Clagett does not extend to a set-off of unliquidated damages; but it cannot be extended to support such a wide proposition. The true deduction would seem to be that the rule in George *v.* Clagett only applies to what can be said to be a proximate motive in dealing with the factor; and the Court was of opinion that his bankruptcy, and the mode thereon of settling with his assignees, could not be taken to be so contemplated.

Unliquidated damages.

Warner *v.* M'Kay.

Of course, where a factor sells *as factor*, the purchaser cannot set off, in an action by the principal for the price of the goods, a debt due to him from the factor. But in a case where the purchaser *bonâ fide* believed (*z*) that the factor was selling to repay himself advances, the purchaser was allowed to set off payments on account made by him to the factor. Whatever may have been the ground of this decision, and whether or not it is capable of being supported, it must not be taken (*a*) to break in upon the principles already stated.

Knowledge of agent is knowledge of principal.

It must, too, be observed that where the buyer employs an agent to act for him in the matter of the purchase, and this agent of the purchaser has knowledge that the goods are not the goods of the factor, though sold in the factor's name, the knowledge of the agent, however acquired, is held to be the knowledge of the buyer himself (*b*); so that in an action by the factor's principal against the purchaser for the price of the goods, the defendant is affected by such knowledge of the agent, and is not, therefore, entitled to set off a debt due to him from the factor against the plaintiff's claim.

Principle of leading case not applicable to brokers.

The principles enunciated above with regard to the right of set-off, though applicable to the case of a factor, must not be considered to apply in any way to the case of a broker, whose position differs from that of a factor in many important particulars. A broker is not trusted with the possession of the goods to be sold, and he ought not to sell in his own name (*c*). The principal, then, who trusts a broker has a right to expect that he will not sell in his own

(*y*) Turner *v.* Thomas (1870), L. R. 6 C. P. 610; 40 L. J. C. P. 271.

(*z*) Warner *v.* M'Kay (1836), 1 M. & W. 591.

(*a*) See per Cresswell, J., in Fish *v.* Kempton, *sup.*

(*b*) Dresser *v.* Norwood (1864), 17 C. B. N. S. 466; 34 L. J. C. P. 48; and see Blackburn *v.* Haslam (1888), 21 Q. B. D. 144; 57 L. J. Q. B. 479; and Bawden *v.* London, Edinburgh, and Glasgow Assce. Co., *ante*, p. 56.

(*c*) Baring *v.* Corrie (1818), 2 B. & Ald. 137; 20 R. R. 383.

name, and the purchaser could not well be led to believe that the broker was the actual owner of the goods which were to form the subject-matter of the sale.

Stevens *v.* Biller.

In Stevens *v.* Biller (*d*), it was held that an agent who is entrusted with the possession of goods for the purpose of sale does not lose his character of factor, or the right of lien attached to it, by reason of his acting under special instructions from his principal to sell the goods at a particular price and to sell in the principal's name. "A factor," said Cotton, L. J., "can sell in his own name as against his principal, whatever restrictions there may be in his instructions. It is not essential, for the purpose of giving him a general lien, that he should be free from any restriction as to the name in which he shall sell the goods. No cases were cited before us for such a proposition, and a case was cited before Mr. Justice Chitty to the contrary—*Ex parte* Dixon (*e*). That case shows that if a factor sells in his own name, although contrary to the instructions of his principal, it will give a right of set-off as between the purchaser and factor; it will not take away his character of factor."

Definition of factor at common law.

The *status* of a factor, as defined by the rules of common law, and of mercantile usage, may be stated briefly as an agent to whom goods are consigned for the purpose of sale, and who has possession of the goods, and is authorized to sell them in his own name upon such terms as he thinks fit, with power to receive the price and give a good discharge to the purchaser. This, however, has, for the purpose of increasing the freedom of mercantile dealings, been considerably enlarged by the "Factors Acts" (*f*), which were repealed and consolidated with amendments by the Factors Act, 1889 (52 & 53 Vict. c. 45). This Act, after defining various expressions subsequently used, proceeds as follows:—

Factors Act, 1889.

Powers of mercantile agent with

"2.—(1) Where a mercantile agent (*g*) is, with the consent of the owner, in possession (*h*) of goods or of the documents of title (*i*)

(*d*) (1883), 25 Ch. Div. 31; 53 L. J. Ch. 249.

(*e*) (1876), 4 Ch. Div. 133; 46 L. J. Bk. 20.

(*f*) (1824), 4 Geo. 4, c. 83; (1826), 6 Geo. 4, c. 94; (1842), 5 & 6 Vict. c. 39; (1877), 40 & 41 Vict. c. 39.

(*g*) Defined by sect. 1 as an agent "having in the customary course of his business as such agent authority either to sell goods, or to consign goods for the purpose of sale, or to buy goods or to raise money on the security of goods." See Hastings *v.* Pearson, [1893] 1 Q. B. 62; 62 L. J. Q. B. 75.

(*h*) Possession is defined by sect. 1 as where "the goods or documents are in his actual custody or are held by any other persons, subject to his control, or for him, or on his behalf."

(*i*) By sect. 1, documents of title include any "bill of lading, dock warrant, warehouse-keeper's certificate, and warrant or order for the delivery of goods, and any other document used in the ordinary course of business as proof of the

respect to disposition of goods.

to goods, any sale, pledge (*k*), or other disposition of the goods, made by him when acting in the ordinary course of business of a mercantile agent, shall, subject to the provisions of this Act, be as valid as if he were expressly authorized by the owner of the goods to make the same; provided that the person taking under the disposition acts in good faith, and has not at the time of the disposition notice that the person making the disposition has not authority to make the same.

"(2) Where a mercantile agent has, with the consent of the owner, been in the possession of goods or of the documents of title to goods, any sale, pledge, or other disposition, which would have been valid if the consent had continued, shall be valid notwithstanding the determination of the consent, provided that the person taking under the disposition has not, at the time thereof, notice that the consent has been determined (*l*).

"(3) Where a mercantile agent has obtained possession of any documents of title to goods by reason of his being or having been, with the consent of the owner, in possession of the goods represented thereby, or of any other documents of title to the goods, his possession of the first-mentioned documents shall, for the purposes of this Act, be deemed to be with the consent of the owner.

"(4) For the purposes of this Act the consent of the owner shall be presumed in the absence of evidence to the contrary.

Effect of pledges of documents of title.

"3. A pledge of the documents of title to goods shall be deemed to be a pledge of the goods.

Pledge for antecedent debt.

"4. Where a mercantile agent pledges goods as security for a debt or liability due from the pledgor to the pledgee before the time of the pledge, the pledgee shall acquire no further right to the goods than could have been enforced by the pledgor at the time of the pledge (*m*).

Rights acquired by exchange of goods or documents.

"5. The consideration necessary for the validity of a sale, pledge, or other disposition of goods, in pursuance of this Act, may be either a payment in cash, or the delivery or transfer of other goods, or of a document of title to goods, or of a negotiable security, or any other valuable consideration; but where goods are pledged by a mercantile agent in consideration of the delivery or transfer of

possession or control of goods, or authorizing or purporting to authorize, either by indorsement or by delivery, the possessor of the document to transfer or receive goods thereby represented."

(*k*) "Pledge" includes any contract pledging or giving a lien or security on goods, whether in consideration of an original advance, or of any further or continuing advance, or of any pecuniary liability. (Sect. 1.)

(*l*) See Fuentes *v.* Montis (1868), L. R. 4 C. P. 93; 38 L. J. C. P. 95.

(*m*) Kaltenbach *v.* Lewis (1885), 10 App. Cas. 617; 55 L. J. Ch. 58.

other goods or of a document of title to goods, or of a negotiable security, the pledgee shall acquire no right or interest in the goods so pledged in excess of the value of the goods, documents, or security when so delivered or transferred in exchange.

Agreements through clerks, &c.

"6. For the purposes of this Act an agreement made with a mercantile agent through a clerk or other person authorized in the ordinary course of business to make contracts of sale or pledge on his behalf shall be deemed to be an agreement with the agent.

Provisions as to consignors and consignees.

"7.—(1) Where the owner of goods has given possession of the goods to another person for the purpose of consignment or sale, or has shipped the goods in the name of another person, and the consignee of the goods has not had notice that such person is not the owner of the goods, the consignee shall, in respect of advances made to or for the use of such person, have the same lien on the goods as if such person were the owner of the goods, and may transfer any such lien to another person.

"(2) Nothing in this section shall limit or affect the validity of any sale, pledge, or disposition by a mercantile agent.

Disposition by seller remaining in possession.

"8. Where a person having sold goods, continues, or is, in possession of the goods, or of the documents of title to the goods, the delivery or transfer by that person, or by a mercantile agent acting for him, of the goods or documents of title under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of the previous sale, shall have the same effect as if the person making the delivery or transfer were expressly authorized by the owner of the goods to make the same (*n*).

Disposition by buyer obtaining possession.

"9. Where a person, having bought or agreed to buy goods, obtains with the consent of the seller possession of the goods or the documents of title to the goods, the delivery or transfer, by that person or by a mercantile agent acting for him, of the goods or documents of title, under any sale, pledge, or other disposition thereof, or under any agreement for sale, pledge, or other disposition thereof, to any person receiving the same in good faith and without notice of any lien or other right of the original seller in respect of the goods, shall have the same effect as if the person making the delivery or transfer were a mercantile agent in possession of the goods or documents of title with the consent of the owner (*o*).

(*n*) Reproduced by sect. 25 of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71); and see Nicholson *v.* Harper, [1895] 2 Ch. 415; 64 L. J. Ch. 672.

(*o*) As to the effect of this section on *hire and purchase* agreements, see *post*, p. 296.

Effect of transfer of documents on vendor's lien or right of stoppage *in transitu*.

"10. Where a document of title to goods has been lawfully transferred to a person as a buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, the last-mentioned transfer shall have the same effect for defeating any vendor's lien or right of stoppage *in transitu* as the transfer of a bill of lading has for defeating the right of stoppage *in transitu*.

Mode of transferring documents.

"11. For the purposes of this Act, the transfer of a document may be by endorsement, or, where the document is by custom or by its express terms transferable by delivery, or makes the goods deliverable to the bearer, then by delivery."

The following cases may be usefully referred to, although decided prior to this Act, namely:—Cole *v.* The North Western Bank (1875), L. R. 10 C. P. 354; 44 L. J. C. P. 233; City Bank *v.* Barrow (1880), 5 App. Cas. 667; 43 L. T. 393; Heyman *v.* Flewker (1863), 13 C. B. N. S. 519; 32 L. J. C. P. 132; Hugill *v.* Masker (1889), 22 Q. B. D. 364; 58 L. J. Q. B. 171; Johnson *v.* Crédit Lyonnais Co. (1877), 3 C. P. D. 32; 47 L. J. C. P. 241.

Agent exceeding Authority Liable in Contract.

[19] COLLEN *v.* WRIGHT. (1857)

[8 E. & B. 647; 27 L. J. Q. B. 215.]

Wright was the land agent of a gentleman named Dunn Gardner, and, professing to have authority to do so, he made an agreement with Collen for the lease to him for twelve and a half years of a farm of Dunn Gardner's. On the strength of this agreement Collen entered on the enjoyment of the farm; but Dunn Gardner refused to execute any such lease, saying that he had never authorized Wright to agree for a lease for so long a term; and this proved to be the fact.

This was an action by Collen against Wright's executors, and the main question was whether Wright's assuming to act as Dunn Gardner's agent to grant the lease amounted to a *contract* on his part that he had such authority. The Court held Wright's executors liable to Collen, on the ground that such a contract or warranty of authority must be implied (*p*).

When a man enters into a contract representing himself as agent for a person named at the time the contract was made, the law will not allow him to shift his position and sue as principal on the contract, "declaring himself principal and the other a creature of straw." This was clearly laid down in Bickerton *v.* Burrell (*q*), where the plaintiff had, at a sale by auction, signed a memorandum of purchase as agent for a named principal, and then, in an action to recover the deposit he had paid to the auctioneer, sought to give evidence that he was really the principal in the matter. It is true that a Court of Equity (*r*) has taken a view adverse to the decision in Bickerton *v.* Burrell, but the authority of the case in equity has been much questioned. Bickerton *v.* Burrell.

When the contract has been in part performed by the plaintiff acting as an agent (*s*), and that part performance has been accepted by the defendant with full knowledge that the plaintiff was not the agent but the real principal, then the action is clearly maintainable. Acceptance of part performance.

The true principle of the cases would seem to be, that, on the professed agent giving the other party notice of his real position before action brought, it is open to the other party either to repudiate the contract altogether, or to ratify it expressly in words or impliedly by his conduct.

Although the circumstances may be such that the professed agent cannot sue upon the contract, nevertheless, as appears from Collen *v.* Wright, he is liable for the damages sustained by reason of the assertion of authority being untrue. He cannot, indeed, be sued *upon the contract itself*, but he is liable on an implied warranty of Agent liable as on implied warranty.

(*p*) This case was recently very fully discussed and approved in the Court of Appeal in Oliver *v.* Bank of England, [1902] 1 Ch. 610; 71 L. J. Ch. 388; and in the House of Lords, *sub nom.* Starkey *v.* Bank of England, [1903] A. C. 114; 72 L. J. Ch. 402.

(*q*) (1816), 5 M. & S. 383.

(*r*) Fellowes *v.* Gwydyr (1832), 1 Russ. & M. 83; 1 Sim. 63.

(*s*) Rayner *v.* Grote (1846), 15 M. & W. 359; 16 L. J. Ex. 69.

authority (*t*). It has, however, been held (*u*) that this doctrine does not apply to a contract made by a public servant acting on behalf of the Crown.

If, however, the party contracting with the agent has notice of his position or authority as a matter of fact, and it is merely a question of law how far his authority exists or extends, as in the case of a solicitor, auctioneer, director of a company, or agent acting under a power of attorney, the legal effect or construction of which is in question, there is no warranty of authority or misrepresentation in law (*x*).

No principal really existing.

Cases often arise where a contract is signed by one who professes to be signing "as agent" for a named principal, but *where there is no such principal existing at the time*, so that the contract would be altogether inoperative unless binding upon the person who signed it; as, *e.g.*, where the alleged principal is entirely fictitious, or where a man enters into an engagement on behalf of a company which has not, at the time of the contract, obtained any legal existence (*y*). In such cases the professed agent is personally bound by the contract, it being assumed, on the principle *ut res magis valeat quam pereat*, that it was in the contemplation of the parties at the time of the making of the contract that the person signing it would be bound thereby. Moreover, in such cases, there would, as a general rule, seem no reason, in the absence of fraud, why the professed agent should not *sue* on the contract in his own name, at any rate in respect of executed contracts.

Ratification.

But it must be noticed that, when there is no principal in existence at the time of the contract, there can be no subsequent ratification. Thus, in an action (*z*) on a cheque drawn by the

(*t*) See also Cherry *v.* Colonial Bank of Australasia (1869), L. R. 3 P. C. 24; 38 L. J. P. D. 49; Richardson *v.* Williamson (1871), L. R. 6 Q. B. 276; 40 L. J. Q. B. 145; Beattie *v.* Ebury (1872), L. R. 7 Ch. 777; 7 H. L. 102; Weeks *v.* Propert (1873), L. R. 8 C. P. 427; 42 L. J. C. P. 129; *Ex parte* Panmure (1883), 24 Ch. D. 627; 53 L. J. Ch. 57; Firbank *v.* Humphreys (1886), 18 Q. B. D. 54; 56 L. J. Q. B. 57; Meek *v.* Wendt (1888), 21 Q. B. D. 126; W. N. (1889) 14; 59 L. T. 558; Haigh *v.* Suart, W. N. (1890) 213; Elkington *v.* Hurter, [1892] 2 Ch. 452; 61 L. J. Ch. 514; Lilly *v.* Smales, [1892] 1 Q. B. 456; 40 W. R. 544; Halbot *v.* Lens, [1901] 1 Ch. 344; 70 L. J. Ch. 125; and Oliver *v.* Bank of England, [1902] 1 Ch. 610; 71 L. J. Ch. 388; affirmed, *sub nom.* Starkey *v.* Bank of England, [1903] A. C. 114; 72 L. J. Ch. 402.

(*u*) Dunn *v.* Macdonald, [1897] 1 Q. B. 401, 555; 66 L. J. Q. B. 420.

(*x*) Saffron Walden Building Society *v.* Rayner (1880), 14 Ch. D. 406; 49 L. J. Ch. 465; and cases *supra*, n. (*t*).

(*y*) Kelner *v.* Baxter (1866), L. R. 2 C. P. 174; 36 L. J. C. P. 94.

(*z*) Scott *v.* Ebury (1867), L. R. 2 C. P. 255; 36 L. J. C. P. 161; *Re* Northumberland Avenue Hotel Co. (1886), 33 Ch. D. 16; 54 L. T. 777.

promoters of a company before the company had acquired any legal existence, it was sought to relieve the promoters from responsibility by showing a subsequent ratification and adoption by the company. This contention was, however, unsuccessful, as "ratification can only be by a person ascertained at the time of the act done, by a person in existence either actually or in contemplation of law."

Agent not disclosing name of principal.

There yet remains one case of professed agency to be considered, namely, where a man holds himself out as agent, but does *not make known the name of his alleged principal;* as, where (*a*) a charter-party was expressed to be made between the defendant as owner of the ship, of the one part, and "G. Schmaltz & Co. (agents of the freighters) of the other part." It was held that, notwithstanding the terms of the charter-party, Schmaltz & Co. might prove that they were in reality the freighters, and their own principals; and, on proof of their being so, were entitled to recover in their own name. And, conversely, no doubt, Schmaltz & Co. might have been sued on the contract, on proof being given that they were really the principals in the transaction. We have seen from the notes to Paterson *v.* Gandasequi that had there been in truth any freighters behind the back of Schmaltz & Co., this firm could neither have sued nor been sued on the charter-party, inasmuch as the document was framed so as to exclude the personal liability of the so-called agents.

Dickson *v.* Reuter's Telegraph Company.

It was sought, in a later case (*b*), to extend the principle of Collen *v.* Wright to support an action for damages caused by the negligence of the defendants, a telegraph company, who delivered to the plaintiffs a telegram ordering a large shipment of barley, no such message having been in fact sent to the plaintiffs. It was held that, inasmuch as the erroneous statement was not fraudulent, and there was no duty owing by the defendants to the plaintiffs in the matter, no action would lie.

"The general rule of law," said Bramwell, L. J., "is clear, that no action is maintainable for a mere statement, although untrue, and although acted on to the damage of the person to whom it is made, unless that statement is false to the knowledge of the person making it. . . . . But then it is urged that the decision in Collen *v.* Wright has shown that there is an exception to that general rule, and it is contended that this case comes within the principle of that exception. I do not think that Collen *v.* Wright,

(*a*) Schmaltz *v.* Avery (1851), 16 Q. B. 655; 20 L. J. Q. B. 228.

(*b*) Dickson *v.* Reuter's Telegraph Co. (1877), 3 C. P. D. 1; 47 L. J. C. P. 1.

properly understood, shows that there is an exception to that general rule. Collen *v.* Wright establishes a separate and independent rule, which, without using language rigorously accurate, may be thus stated; if a person requests and, by asserting that he is clothed with the necessary authority, induces another to enter into a negotiation with himself, and a transaction with the person whose authority he represents that he has, in that case there is a contract by him that he has the authority of the person with whom he requests the other to enter into the transaction. That seems to me to be the substance of the decision in Collen *v.* Wright. If so, it appears to me that it does not apply to the facts before us, because, in the present case, I do not find any request by the defendants to the plaintiffs to do anything. The defendants are simply the deliverers of what they say is a message from certain persons to the plaintiffs. No contract exists: no promise is made by the defendants, nor does any consideration move from the plaintiffs. It appears to me, therefore, that there is a distinction between this case and Collen *v.* Wright, and consequently we cannot have recourse to that case to take this out of the general rule to which I have referred."

Measure of damages.

It should be observed that the damages recoverable, in cases of this description, against the supposed agent are not necessarily identical with those which would have been recoverable from the principal (had the agency existed) for not fulfilling the contract (*c*). The measure of the damages recoverable against the supposed agent is, in ordinary cases of this kind, the actual loss sustained by the plaintiff by reason of his not having the valid contract which the agent impliedly warranted that he should have (*d*).

(*c*) See Richardson *v.* Williamson (1871), L. R. 6 Q. B. 276; 40 L. J. Q. B. 145, per Blackburn, J.; Weeks *v.* Propert (1873), L. R. 8 C. P. 427; 42 L. J. C. P. 129; and *Re* National Coffee Palace Co. (1885), 24 Ch. D. 367; 53 L. J. Ch. 57.

(*d*) Simons *v.* Patchett (1857), 7 El. & Bl. 568; 26 L. J. Q. B. 195; *Re* National Coffee Palace Co., *supra;* Meek *v.* Wendt (1888), 21 Q. B. D. 126; 59 L. T. 558. See also Pow *v.* Davis (1861), 30 L. J. Q. B. 257; 1 B. & S. 220; Hughes *v.* Graeme (1864), 33 L. J. Q. B. 335; 12 W. R. 857; Spedding *v.* Nevell (1869), L. R. 4 C. P. 212; 38 L. J. C. P. 133; and Godwin *v.* Francis (1870), L. R. 5 C. P. 295; 39 L. J. C. P. 121.

Partnership Liability.

WAUGH *v.* CARVER. (1794) [20]

[2 H. Bl. 235; 14 R. R. 845.]

Erasmus Carver and William Carver, ship-agents, of Southampton, of the one part, and Archibald Giesler, ship-agent, of Plymouth, of the other part, entered into an agreement for their mutual benefit. By the terms of this agreement, Giesler was to remove from Plymouth and settle at Cowes. There he was to establish a house on his own account, which the Carvers were to puff. Giesler, on the other hand, was to endeavour to persuade all the ship-masters putting into Portsmouth to employ the Carvers. Arrangements were made for sharing in certain proportions the profits of their respective commissions, and the discount on the bills of tradesmen employed by them in repairing the ships consigned to them. It was also expressly provided that neither of the parties to the agreement should be answerable for the acts or losses of the other, but each for his own. Accordingly, Giesler left Plymouth and came to Cowes, and in the course of carrying on his business there he incurred a certain debt to the plaintiff in this action, who now sought to make the Carvers liable on the ground that the agreement made them partners with Giesler and responsible for his debts.

It was held, in spite of the clause providing that each should be responsible for his own losses, that the agreement did make the Carvers partners.

[21] COX *v.* HICKMAN. (1860)

[8 H. L. C. 268; 30 L. J. C. P. 125.]

Messrs. Smith and Co., iron merchants, becoming insolvent, a deed of arrangement was executed between them and their creditors. By this deed, Smith and Co. assigned all their property to five trustees to carry on the business under the name of the Stanton Iron Company. The trustees were to manage the works as they thought fit, and to execute all contracts and instruments in carrying on the business. Amongst the creditors were the defendants. They subscribed and executed the deed, and were both named as trustees. One of them never acted at all; the other acted for six weeks and then resigned. The other trustees, however, did act, and did the best they could for the business. The plaintiff supplied the company with a quantity of iron ore, and one of the trustees accepted bills of exchange in the name of the company for the price of it.

The question was whether the trustees were agents for the defendants to accept the bills, and it was held that they were *not;* on the ground that the persons for whose benefit the business was carried on were not the creditors, but Messrs. Smith and Co. The real test of partnership liability, the judges said, was *not* participation in the profits, but whether the trade was carried on by persons acting as the *agents* of the persons sought to be made liable.

Partnership Act, 1890.

The Partnership Act, 1890 (53 & 54 Vict. c. 39), has codified the substantive law relating to the rights and liabilities of partners; but the case-law on the subject has not been abrogated; for sect. 46 declares that "the rules of equity and common law applicable to partnership shall continue in force except so far as they are inconsistent with the express provisions of this Act." The previous decisions, therefore, are necessary in order fully to understand the meaning of the provisions in the Act.

Partnership is the relation which subsists between persons carrying on a business in common with a view of profit (*e*). Persons may be joint owners of property without being partners, which is illustrated in the cases of Steward *v.* Blakeway (1869), L. R. 4 Ch. 603; Mollwo, March & Co. *v.* Court of Wards (1872), L. R. 4 P. C. 419; and Walker *v.* Hirsch (1884), 27 Ch. D. 460; 54 L. J. Ch. 313; *In re* Wilson, Wilson *v.* Holloway, [1893] 2 Ch. 340; 62 L. J. Ch. 781. A private partnership cannot be formed of more than ten persons for banking, or twenty for any other business (*f*). Definition of partnership. Joint owners.

Persons may be partners as regards the world at large, although they are not partners as between themselves; they may have all the kicks and none of the halfpence. If a man holds himself out as a partner, he is liable to a person who, for that reason, gives credit to the firm (*g*). The law does not prescribe any particular acts which shall constitute a "holding out"; but evidence may be given of anything the defendant has done which would naturally induce others to believe he was a partner, such acts having the effect of an estoppel. A person who lends his name to a business in this way, without having any real interest in it, is called a *nominal* partner. A *dormant* partner, on the other hand, is one who does not appear to the world to be a partner, but who shares the profits. Holding out. Dormant partners.

It was for a long time thought that if it could be proved that the defendant *shared the profits*, he was thereby proved to be a partner. The effect of Cox *v.* Hickman is to destroy this doctrine; and the law now is, that though community in the profits is *strong* evidence of partnership, it is *not conclusive*. There must always be an examination into the *intention* of the contracting parties. Thus where a sum of money was advanced to a trader under an agreement Effect of sharing profits.

(*e*) Sect. 1 (1). See Green *v.* Beesley (1835), 2 Bing. N. C. 108; 42 R. R. 539; Steel *v.* Lester (1877), 3 C. P. D. 121; 47 L. J. C. P. 43; French *v.* Styring (1857), 2 C. B. N. S. 357; 26 L. J. C. P. 181; Lyon *v.* Knowles (1863), 3 B. & S. 556; 32 L. J. Q. B. 71; London Financial Association *v.* Kelk (1884), 26 Ch. D. 107, 143; 53 L. J. Ch. 1025; *In re* Whitcley, *Ex parte* Smith (1892), 66 L. T. 291; 67 L. T. 69. The eighth edition of Sir Frederick Pollock's "Law of Partnership," which incorporates the new Act, and deals with the whole of its provisions in a comprehensive manner, should be consulted in order fully to appreciate the existing law on the subject.

(*f*) Companies Act, 1862 (25 & 26 Vict. c. 89), s. 4.

(*g*) Dickenson *v.* Valpy (1829), 10 B. & C. 128; 34 R. R. 348; Fox *v.* Clifton (1830), 6 Bing. 776; 31 R. R. 544; Martyn *v.* Gray (1863), 14 C. B. N. S. 824; *Ex parte* Hayman (1878), 8 Ch. D. 11; 47 L. J. Ch. 54; Carter *v.* Whalley (1830), 1 B. & Ad. 11; 35 R. R. 199; Quarman *v.* Burnett (1840), 6 M. & W. 499; 4 Jur. 969; and *post*, p. 502; Partnership Act, 1890, s. 14.

in writing whereby it was stipulated that the lender should have the entire control of the business and an option (which was not exercised) of becoming a partner, and should receive by way of remuneration for his services, and for interest on his advance, certain fixed weekly payments out of the profits of the business, it was recently held (*h*) that such an agreement did not constitute the lender a partner, but that the money so advanced was an advance upon the terms of "receiving a share of the profits" within the meaning of sect. 2, sub-sect. 3 (d) of the Partnership Act, 1890 (*infra*), and that the lender was consequently postponed to other creditors.

The Act passed in 1865, known as Bovill's Act (*i*), was repealed by the Partnership Act, 1890, but its provisions re-appear in a different form in sects. 2 and 3, which are as follows:—

Rules for determining existence of partnership.

"2. In determining whether a partnership does or does not exist, regard shall be had to the following rules:—

(1.) Joint tenancy, tenancy in common, joint property, common property, or part ownership does not of itself create a partnership as to anything so held or owned, whether the tenants or owners do or do not share any profits made by the use thereof;

(2.) The sharing of gross returns does not of itself create a partnership, whether the persons sharing such returns have or have not a joint or common right or interest in any property from which, or from the use of which, the returns are derived;

(3.) The receipt by a person of a share of the profits of a business is *primâ facie* evidence that he is a partner in the business; but the receipt of such a share, or of a payment contingent on or varying with the profits of a business, does not of itself make him a partner in the business; and in particular—

(*a*) The receipt by a person of a debt or other liquidated amount by instalment or otherwise out of the accruing profits of a business does not of itself make him a partner in the business or liable as such;

(*b*) A contract for the remuneration of a servant or agent of a person engaged in a business by a

(*h*) *In re* Young, *Ex parte* Jones, [1896] 2 Q. B. 484; 65 L. J. Q. B. 680; and see Hollom *v.* Whichelow (1895), 64 L. J. Q. B. 170; and King *v.* Whichelow (1895), 64 L. J. Q. B. 801.

(*i*) 28 & 29 Vict. c. 86.

share of the profits of the business does not of itself make the servant or agent a partner in the business or liable as such;

(*c*) A person being the widow or child of a deceased partner, and receiving by way of annuity a portion of the profits made in the business in which the deceased person was a partner, is not by reason only of such receipt a partner in the business or liable as such;

(*d*) The advance of money by way of loan to a person engaged or about to engage in any business, on a contract with that person that the lender shall receive a rate of interest varying with the profits, or shall receive a share of the profits arising from carrying on the business, does not of itself make the lender a partner with the person or persons carrying on the business or liable as such. Provided that the contract is in writing, and signed by or on behalf of all the parties thereto;

(*e*) A person receiving by way of annuity or otherwise a portion of the profits of a business in consideration of the sale by him of the goodwill of the business, is not by reason only of such receipt a partner in the business or liable as such."

This section is merely declaratory of the law as it stood, and did not make any change in the law as previously settled (*k*).

Postponement of rights of person lending or selling in consideration of share of profits in case of insolveney.

"3. In the event of any person to whom money has been advanced by way of loan upon such a contract as is mentioned in the last foregoing section, or of any buyer of a goodwill in consideration of a share of the profits of the business, being adjudged a bankrupt, entering into an arrangement to pay his creditors less than twenty shillings in the pound, or dying in insolvent circumstances, the lender of the loan shall not be entitled to recover anything in respect of his loan, and the seller of the goodwill shall not be entitled to recover anything in respect of the share of profits contracted for, until the claims of the other creditors of the borrower, or buyer for valuable consideration in money or money's worth, have been satisfied" (*l*).

(*k*) See Davis *v.* Davis, [1894] 1 Ch. 393; 63 L. J. Ch. 219.

(*l*) See *In re* Hildesheim, [1893] 2 Q. B. 357; 69 L. T. 550, where the rule laid down in *Ex parte* Mills (1873), 8 Ch. 569; 28 L. T. 606; *Ex parte* Taylor (1879), 12 Ch. D. 366; 41 L. T. 6; *Re* Stone (1886), 33 Ch. D. 541; 55 L. J. Ch. 795; *Ex parte* Macarthur (1871), 40 L. J. Bky. 86; 19 W. R. 821—namely, that an alteration of the

Illustrations.

As illustrating sub-sect. 3 of sect. 2, the following cases should be consulted, namely:—Bullen *v.* Sharp (1865), L. R. 1 C. P. 86; 34 L. J. C. P. 174; Holme *v.* Hammond (1872), L. R. 7 Ex. 218; 41 L. J. Ex. 157; Ross *v.* Parkyns (1875), L. R. 20 Eq. 331; 44 L. J. Ch. 610; Pooley *v.* Driver (1876), 5 Ch. D. 458; 46 L. J. Ch. 466; Syers *v.* Syers (1876), 1 App. Cas. 174; 35 L. T. 101; *Ex parte* Tennant (1877), 6 Ch. D. 303; 37 L. T. 284; *Ex parte* Delhasse (1878), 7 Ch. D. 511; 47 L. J. Ch. 65 (which decided that though an agreement is expressed to be an agreement for a loan to a partnership under sect. 1 of Bovill's Act, and contains a declaration that the lender shall not be a partner, he will nevertheless be a partner if the result of the agreement, fairly construed as a whole, independently of the reference to the Act and the declaration, is to give him the rights and impose on him the obligations of a partner); Pawsey *v.* Armstrong (1881), 18 Ch. D. 698; 50 L. J. Ch. 683; and Badeley *v.* Consolidated Bank (1888), 38 Ch. D. 238; 57 L. J. Ch. 468; considered in the case of Davis *v.* Davis, [1894] 1 Ch. 393; 63 L. J. Ch. 219.

Authority of partner to bind the firm.

Partnership is a branch of the law of agency, and "Every partner is an agent of the firm and his other partners for the purpose of the business of the partnership; and the acts of every partner who does any act for carrying on in the usual way business of the kind carried on by the firm of which he is a member, bind the firm and his partners, unless the partner so acting has in fact no authority to act for the firm in the particular matter, and the person with whom he is dealing either knows that he has no authority, or does not know or believe him to be a partner" (*m*). The proper test to apply to the liability of a partner who is not an actual party to a particular contract is *whether the partner who contracted did so as his agent*. "The acts of a partner done in the name of a firm will not bind the firm merely because they are convenient, or prudent, or even necessary for the particular occasion. The question is, what is necessary for the usual conduct of the partnership business; that is the limit of each partner's general authority" (*n*). "A power to do what is usual does not include a power to do what is unusual, how-

terms of the original advance does not take the case out of the Act, unless the transaction amounts to a repayment of the advance and the making of a new loan—was upheld and applied.

(*m*) Partnership Act, 1890, s. 5. See also sects. 6, 7, 8, 10, 11, and 12, and the following cases:—*Ex parte* Darlington Banking Co. (1864), 4 D. J. & S. 581; 34 L. J. B. 10; Baird's case (1870), 5 Ch. 725; 39 L. J. Ch. 134; Yorkshire Banking Co. *v.* Beatson (1880), 5 C. P. D. 109; 49 L. J. Q. B. 380.

(*n*) Pollock on Partnership, p. 28 (8th ed.).

ever urgent" (*o*). When questions of this kind arise, reference should always be made to the nature and purposes of the partnership. A member of a *mercantile firm*, for instance, would generally bind the firm by accepting a bill of exchange (*p*); not so a member of a *firm of solicitors* (*q*). Nor has a member of a firm of solicitors any implied authority to constitute himself a trustee so as to make his partners liable (*r*), or to allow the use of the firm name by another solicitor (*s*). A trading firm is bound, it has been held, by one of its members releasing a debt due to it, or by the sale or insurance of the partnership goods by one of its members (*t*); but a partner cannot bind his colleagues by a *submission to arbitration* (*u*). And it has been held (*x*) that in an action on a bill of costs against two partners, the fact that one partner allows judgment to be signed against him does not create an estoppel or prevent the other partner from defending the action and recovering any over-payment by the firm to the plaintiff. The particular transactions in which the power of a partner to bind the firm has been called in question, and either upheld or disallowed, are exhaustively dealt with in Lindley on Partnership (pp. 140-157, 6th edit.). The most recent case on this point is Hamlyn *v.* Henston (*y*), where one partner in a firm, without the consent or knowledge of his co-partner, by bribery induced a clerk of the plaintiff, a competitor in trade, dishonestly and improperly, and in breach of his duty to his employer, to communicate secret and confidential information in regard to the plaintiff's business, whereby the plaintiff suffered loss. It was in the ordinary course of the business of the firm for the partner to obtain by legitimate means information as to the business of competitors in trade, and the partner acted as above for the benefit of his firm. Under these circumstances the Court of Appeal held that the partner was acting within the scope of his authority, and that

Hamlyn *v.* Henston.

(*o*) Lindley, p. 135 (6th ed.); Hawtayne *v.* Bourne (1841), 7 M. & W. 595; 10 L. J. Ex. 244.

(*p*) Kirk *v.* Blurton (1843), 9 M. & W. 284; 12 L. J. Ex. 117; Forbes *v.* Marshall (1855), 11 Ex. 166; 24 L. J. Ex. 305.

(*q*) Hedley *v.* Bainbridge (1845), 3 Q. B. 316; 2 G. & D. 483; and see Garland *v.* Jacomb (1873), L. R. 8 Ex. 216; 28 L. T. 877.

(*r*) Mara *v.* Browne, [1896] 1 Ch. 199; 65 L. J. Ch. 225; and see Tendring Hundred Waterworks Co. *v.* Jones, [1903] 2 Ch. 615.

(*s*) Marsh *v.* Joseph, [1897] 1 Ch. 213; 66 L. J. Ch. 128.

(*t*) Stead *v.* Salt (1825), 3 Bing. 101; 28 R. R. 602; Hooper *v.* Lusby (1814), 4 Camp. 66; Brettel *v.* Williams (1849), 4 Ex. 623; 19 L. J. Ex. 121; Niemann *v.* Niemann (1890), 43 Ch. D. 198; 59 L. J. Ch. 220.

(*u*) Adams *v.* Bankart (1835), 1 C. M. & R. 681; 40 R. R. 670; Duncan *v.* Lowndes (1813), 3 Camp. 478; 14 R. R. 815; Farrar *v.* Cooper (1890), 44 Ch. D. 323; 59 L. J. Ch. 506.

(*x*) Weall *v.* James (1894), 68 L. T. 54; 5 R. 157.

(*y*) [1903] 1 K. B. 81; 87 L. T. 500.

the firm was liable for his wrongful act. Moreover, if the plaintiff was *aware of the want of authority*, even in cases where one partner might naturally be expected to have authority to contract for the others, he cannot recover (*z*). A partner is liable on partnership contracts, not only to the extent of the capital he has embarked in the concern, but to the whole extent of his means, unless it is a partnership in a company with limited liability. As to the liability of persons who have become *subscribers to a company projected but not finally established*, the cases of Reynell *v.* Lewis (1846), 15 M. & W. 517; Bailey *v.* Macaulay (1849), 13 Q. B. 815; Kelner *v.* Baxter (1866), L. R. 2 C. P. 174; 36 L. J. C. P. 94; and Fox *v.* Clifton (1830), 6 Bing. 776, may be consulted. And as to the liability of trustees for debenture holders, see Gosling *v.* Gaskell, [1897] A. C. 575; 66 L. J. Q. B. 848.

Liability of shareholders.

Trustees for debenture holders.

Mines.

Mines within the Stannaries of Devon and Cornwall are often worked by unincorporated partnerships with transferable shares on what is termed the "cost-book" principle, and the shareholders in such a company are liable on all usual contracts for goods supplied (*a*).

Incoming partner.

"A person who is admitted as a partner into an existing firm does not thereby become liable to the creditors of the firm for anything done before he became a partner" (*b*). But when A. has a contract with B., and B. takes C. into partnership and gives A. notice, A. has an option whether he will abide by his contract with B. alone, or accept the liability of the partnership. If he elect to abide by his contract with B., C. is not liable (as has been recently held) for a fraud committed by B. against A. in respect of the contract, though B. was acting within the scope of the partnership business (*c*).

Retiring partner.

"A partner who retires from a firm does not thereby cease to be liable for partnership debts or obligations incurred before his retirement (*d*).

"A retiring partner may be discharged from any existing liabilities by an agreement to that effect between himself and the members of the firm as newly constituted and the creditors, and

(*z*) Sect. 8 of the Partnership Act, 1890 (53 & 54 Vict. c. 39); and see Gallway *v.* Mathew (1808), 10 East, 264; 10 R. R. 289.

(*a*) Hawken *v.* Bourne (1842), 8 M. & W. 703; 10 L. J. Ex. 361; Ralph *v.* Harvey (1841), 1 Q. B. 845; 10 L. J. Q. B. 337; and see Harrison *v.* Heathorn (1845), 6 M. & G. 81; 12 L. J. C. P. 203.

(*b*) Partnership Act, 1890, s. 17, sub-s. 1; Beale *v.* Mouls (1847), 10 Q. B. 976; 16 L. J. Q. B. 410; Vere *v.* Ashby (1829), 10 B. & C. 288; 8 L. J. K. B. 57; Cripp *v.* Tappin (1882), 1 C. & E. 13.

(*c*) British Homes Assurance Corporation *v.* Paterson, [1902] 2 Ch. 404; 71 L. J. Ch. 872.

(*d*) Sect. 17, sub-sect. 2.

this agreement may be either express or inferred as a fact from the course of dealing between the creditors and the firm as newly constituted" (*e*).

When a person who has held himself out as a partner retires from the firm, he, of course, continues liable on contracts entered into *before* his retirement. In the case of Court *v.* Berlin (*f*), the active partner in a firm consisting of himself and two dormant partners retained a solicitor to conduct an action for the recovery of a debt due to the firm. While the action was pending the partnership was dissolved, and the dormant partners retired from the business. No notice of the dissolution was given to the solicitor, who did not know of the existence of the dormant partners, nor did the dormant partners do anything by way of withdrawing the retainer. The Court held that, as the contract of the solicitor upon the retainer was an entire contract by which he undertook to carry on the action to its termination except for good cause, the dormant partners were liable to the solicitor for costs in the action incurred subsequently to the dissolution of the partnership. As to contracts entered into by the firm *after* his retirement, the rule is this:—If he has advertised his retirement in the Gazette, he is not liable to *persons who did not deal with the firm when he was a member of it* (*g*). But to prevent his being liable to persons who *did* deal with the firm when he was a member of it, advertisement in the Gazette is not sufficient, the old customers, unless aware of the retirement, being entitled to express notice (*h*). If, however, a creditor who knows that a reconstruction of the firm has taken place, elects to accept the new firm as his debtors, and goes on dealing with it just as before, the retiring partner is released and cannot be afterwards charged (*i*). A *dormant* partner, except as regards persons who knew him to be a partner, need not give anybody any notice of his retirement (*k*).

Past contracts.

Future contracts.

(*e*) Sect. 17, sub-sect. 3.

(*f*) [1897] 2 Q. B. 396; 66 L. J. Q. B. 714. As to the authority of a managing partner to instruct solicitors, see Tomlinson *v.* Broadsmith, [1896] 1 Q. B. 386; 65 L. J. Q. B. 308.

(*g*) See *In re* Fraser, *Ex parte* Central Bank of London, [1892] 2 Q. B. 633; 67 L. T. 401, following Newsome *v.* Coles (1816), 2 Camp. 617. The Court will, if necessary, order a partner to sign a notice of dissolution for insertion in the Gazette: see Hendry *v.* Turner (1886), 32 Ch. D. 355; 55 L. J. Ch. 562.

(*h*) Farrar *v.* Deflinne (1843), 1 C. & K. 580; Partnership Act, 1890, s. 36.

(*i*) Hart *v.* Alexander (1838), 2 M. & W. 484; 6 L. J. (N. S.) Ex. 129; Bilborough *v.* Holmes (1876), 5 Ch. Div. 255; 35 L. T. 759; Scarf *v.* Jardine (1882), 7 App. Cas. 345; 51 L. J. Q. B. 612; but see Rouse *v.* Bradford Banking Co., [1894] A. C. 586; 63 L. J. Ch. 890.

(*k*) Carter *v.* Whalley (1830), 1 B. & Ad. 11; 35 R. R. 199.

Dissolution of partnership. Law.

There are various ways in which a partnership may be dissolved:—

(1.) *By operation of law;*

E.g., through death (*l*), bankruptcy (*m*), or conviction for felony.

It may be taken as a general proposition, that the estate of a deceased partner is not liable to third parties for what may be done after his decease by the surviving partners; and, on that ground, it has been held that they cannot be restrained at the suit of the executors of the deceased from continuing to carry on the business of the late firm in the old name (*n*). A recent illustration of this rule is afforded by the case of Friend *v.* Young (*o*). There, F. & Co., a firm of commission agents, in 1894 procured an order for certain goods, and the order was executed by E. & Co., and the goods delivered subsequently to the death of one of the partners in the firm, but in ignorance of his death, and the purchase money was received by the surviving partner and not accounted for. Under these circumstances it was held that no "obligation" was incurred by the estate of the deceased partner within sect. 9 of the Partnership Act, 1890. Moreover, it has been decided that when two partners had entered into a contract with a third person to employ him as agent for four and a half years, and before the period expired one partner died, the surviving partner was under no obligation to continue to employ him as agent (*p*). But, on the other hand, reference should be made to the recent case of Phillips *v.* Hull Alhambra Palace Co. (*q*); the plaintiffs entered into a contract with a firm of three partners who described themselves as a company, but the plaintiffs knew nothing about the composition of the company or of the firm. The contract was signed by one of the partners as "manager" for the company, and under it the plaintiffs were engaged to give two series of performances at different dates at a music-hall. One of the partners died, but no notice of his death was given to the plaintiffs, who subsequently carried out the first series of performances, and were paid for the same by the surviving partners. The plaintiffs afterwards received a notice that, owing to the death of the partner, the contract was cancelled. The Divisional Court held, however, that as the contract had no relation to the personal conduct of the deceased

(*l*) Backhouse *v.* Charlton (1878), 8 Ch. D. 444; 26 W. R. 504.

(*m*) Crawshay *v.* Collins (1826), 15 Ves. 228; 1 Jac. & Walk. 278.

(*n*) See Lindley on Partnership, p. 621 (6th ed.), citing Webster *v.* Webster (1791), 3 Swanst. 490, n.

(*o*) [1897] 2 Ch. 421; 66 L. J. Ch. 737. And see Bagel *v.* Miller, [1903] 2 K. B. 212; 72 L. J. K. B. 495.

(*p*) Tasker *v.* Shepheard (1861), 6 H. & N. 575; 30 L. J. Ex. 207.

(*q*) [1901] 1 K. B. 59; 70 L. J. K. B. 26.

partner, the liability of the three partners was not discharged, but could be enforced against the survivors.

(2.) *By agreement;* Agreement.

E.g., if entered into for a fixed term, by the expiration of that term, or if entered into for a single adventure or undertaking, by the termination of that adventure or undertaking (*r*). And it has recently been held, that under a general submission by partners of all matters in difference between them, an arbitrator has power to award a dissolution of the partnership (*s*).

(3.) *By a judicial decree;* Judicial decree.

E.g., where the partnership was induced by fraud (*t*), or where one of the partners neglects his business (*u*), or becomes permanently insane (*x*), or is always quarrelling with the other partners (*y*), or when the business can only be carried on at a loss (*z*).

"The interests of partners in the partnership property, and their rights and duties in relation to the partnership, are determined, subject to any agreement, express or implied, between the partners, by the following rules (*a*):— Rules as to interests and duties of partners, subject to special agreement.

(1.) All the partners are entitled to share equally in the capital and profits of the business, and must contribute equally towards the losses, whether of capital or otherwise, sustained by the firm.

(2.) The firm must indemnify every partner in respect of payments made and personal liabilities incurred by him—

(a) In the ordinary and proper conduct of the business of the firm; or

(b) In or about anything necessarily done for the preservation of the business or property of the firm.

(3.) A partner making, for the purpose of the partnership, any actual payment or advance beyond the amount of capital which he has agreed to subscribe, is entitled to interest at

(*r*) Partnership Act, 1890, s. 32; Featherstonhaugh *v.* Fenwick (1810), 17 Ves. 298; 11 R. R. 77.

(*s*) Vaudrey *v.* Simpson, [1896] 1 Ch. 166; 65 L. J. Ch. 369.

(*t*) Rawlins *v.* Wickham (1858), 1 Giff. 355; 28 L. J. Ch. 188; Partnership Act, 1890, s. 41; Mycock *v.* Beatson (1879), 13 Ch. D. 384; 49 L. J. Ch. 127; Newbigging *v.* Adam (1888), 13 App. Cas. 308; 57 L. J. Ch. 1066.

(*u*) Harrison *v.* Tennant (1856), 21 Beav. 482; Smith *v.* Mules (1852), 9 Hare, 556; 21 L. J. Ch. 803; Cheesman *v.* Price (1865), 35 Beav. 142.

(*x*) Rowlands *v.* Evans (1863), 30 Beav. 302; 31 L. J. Ch. 265.

(*y*) Watney *v.* Wells (1863), 30 Beav. 56, 32 L. J. Ch. 194; Leary *v.* Shout (1865), 33 Beav. 582.

(*z*) Partnership Act, 1890, s. 35; Jennings *v.* Baddeley (1856), 3 K. & J. 78; 3 Jur. N. S. 108.

(*a*) Sect. 24.

the rate of five per cent. per annum from the date of the payment or advance.

(4.) A partner is not entitled, before the ascertainment of profits, to interest on the capital subscribed by him.

(5.) Every partner may take part in the management of the partnership business.

(6.) No partner is entitled to remuneration for acting in the partnership business (*b*).

(7.) No person may be introduced as a partner without the consent of all existing partners.

(8.) Any difference arising as to ordinary matters connected with the partnership business may be decided by a majority of the partners, but no change may be made in the nature of the partnership business without the consent of all existing partners (*c*).

(9.) The partnership books are to be kept at the place of business of the partnership (or the principal place, if there is more than one), and every partner may, when he thinks fit, have access to and inspect and copy any of them" (*d*).

Expulsion of partner.

"No majority of the partners can expel any partner unless a power to do so has been conferred by express agreement between the partners" (*e*).

Retirement from partnership at will.

"Where no fixed term has been agreed upon for the duration of the partnership, any partner may determine the partnership at any time on giving notice of his intention so to do to all the other partners" (*f*).

Where partnership for term is continued over, continuance on old terms presumed.

"When a partnership entered into for a fixed term is continued after the term has expired, and without any express new agreement, the rights and duties of the partners remain the same as they were at the expiration of the term, so far as is consistent with the incidents of a partnership at will" (*g*).

Account-

"Every partner must account to the firm for any benefit derived by him without the consent of the other partners from any trans-

(*b*) Airey *v.* Borham (1861), 29 Beav. 620.

(*c*) Clements *v.* Norris (1878), 8 Ch. D. 129; 47 L. J. Ch. 546.

(*d*) And this right may be exercised by an agent, to whom no personal objection can be made, as well as personally. See Bevan *v.* Webb, [1901] 2 Ch. 59; 70 L. J. Ch. 536.

(*e*) Sect. 25. See, however, Russell *v.* Russell (1880), 14 Ch. D. 471; 49 L. J. Ch. 268; and Barnes *v.* Youngs, [1898] 1 Ch. 414; 67 L. J. Ch. 263.

(*f*) Sect. 26.

(*g*) Sect. 27 (1). And see Yates *v.* Finn (1880), 13 Ch. D. 839; 49 L. J. Ch. 188; Cox *v.* Willoughby (1880), 13 Ch. D. 863; 49 L. J. Ch. 237; Neilson *v.* Mossend Iron Co. (1886), 11 App. Cas. 298; and Daw *v.* Herring, [1892] 1 Ch. 284; 61 L. J. Ch. 5.

action concerning the partnership, or from any use by him of the partnership property, name, or business connexion" (*h*). And "if a partner, without the consent of the other partners, carries on any business of the same nature as and competing with that of the firm, he must account for and pay over to the firm all profits made by him in that business." Liability of partners for private profits. Duty of partner not to compete with firm.

"In settling accounts between parties after a dissolution of partnership, the following rules prevail, subject to any agreement to the contrary:— Winding up partnership.

(a) Losses, including losses and deficiencies of capital, shall be paid first out of profits, next out of capital, and lastly, if necessary, by the partners individually in the proportion in which they were entitled to share profits.

(b) The assets of the firm, including the sums, if any, contributed by the partners to make up losses or deficiencies of capital, shall be applied in the following manner and order:—

1. In paying the debts and liabilities of the firm to persons who are not partners therein:
2. In paying to each partner rateably what is due from the firm to him for advances as distinguished from capital:
3. In paying to each partner rateably what is due from the firm to him in respect of capital:
4. The ultimate residue, if any, shall be divided among the partners in the proportion in which profits are divisible" (*i*).

When a person has been taken into partnership on the terms that on the expiration of the partnership the goodwill of the business shall belong solely to the other partner, he is not entitled to canvass the customers of the old firm after the termination of the partnership, though he may set up a rival business (*k*). So too, on a sale by one of two partners of all his interest in the partnership assets to the other partner, goodwill not being expressly mentioned, the vendor is under an obligation not to canvass the old customers of the firm (*l*). Trego *v.* Hunt. Jennings *v.* Jennings.

(*h*) Sect. 29 (1); Aas *v.* Benham, [1891] 2 Ch. 244; 65 L. T. 25.

(*i*) Potter *v.* Jackson (1880), 13 Ch. D. 845; 49 L. J. Ch. 232; Binney *v.* Mutrie (1886), 12 App. Cas. 160; 36 W. R. 129, P. C. Sect. 44 of the Partnership Act, 1890.

(*k*) Trego *v.* Hunt, [1896] A. C. 7; 65 L. J. Ch. 1; approving Labouchere *v.* Dawson (1872), L. R. 13 Eq. 322; 41 L. J. Ch. 427; and overruling the reasoning in Pearson *v.* Pearson (1884), 27 Ch. D. 145; 54 L. J. Ch. 32; and see Gillingham *v.* Beddow, [1900] 2 Ch. 242; 69 L. J. Ch. 527; and *post*, p. 197.

(*l*) Jennings *v.* Jennings, [1898] 1 Ch. 378; 67 L. J. Ch. 190.

In re David and Matthews.

Burchell *v.* Wilde.

The law with regard to the disposal of goodwill on the dissolution of a partnership, and as to surviving or continuing partners' right to set up a rival business, was discussed and explained in the recent case of *In re* David and Matthews (*m*). And in the still more recent case of Burchell *v.* Wilde (*n*), it was held that on the dissolution of a partnership between solicitors, in the absence of any express stipulation, each partner is entitled to use the old firm name, provided such use does not expose the other partners to liability or risk. Risk for this purpose means appreciable risk in a business sense.

Mortgagor's Tenants.

[22] KEECH *v.* HALL. (1778)

[1 Doug. 21.]

The owner of a warehouse mortgaged it to Keech, but remained in possession. Soon afterwards, without saying a word to Keech on the subject, he leased it for seven years to Hall. Keech said the mortgagor had exceeded his rights, having no business to do such a thing without consulting him, and that Hall was *no better than a trespasser, and could be ejected without notice.* And the judges coincided with his view of the matter.

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[23] MOSS *v.* GALLIMORE. (1780)

[1 Doug. 279.]

In this case it was held that *a mortgagee after giving notice of the mortgage to a tenant in possession under a lease*

(*m*) [1899] 1 Ch. 378; 68 L. J. Ch. 185.

(*n*) [1900] 1 Ch. 551; 69 L. J. Ch. 314.

prior to the mortgage is entitled to the rent in arrear at the time of the notice as well as to what accrues afterwards, and may distrain for it after such notice.

Difference between two leading cases.

The former of these two cases has to do with leases made by the mortgagor *after* the mortgage, the latter with leases made by the mortgagor *before* the mortgage.

What is the true position of mortgagor?

The true position of a mortgagor in respect of his power of dealing with the mortgaged premises, especially in regard to the granting of leases and the creation of tenancies, of course varies according to the particular circumstances. In the case of a simple mortgage without any further agreement or condition, the mortgagor becomes a tenant at sufferance of the mortgagee (*o*) immediately upon the execution of the deed; but should he remain in possession of the premises, with the consent of the mortgagee, he is then held to be in the position of a tenant at will. Though such consent need not be express, it may, however, be taken that it cannot be implied from the mere fact that the mortgagee did not oust the mortgagor from the premises directly the mortgage deed was executed. So long as the mortgagor remains no more than a tenant at sufferance he is, of course, not entitled to any notice to quit.

Express covenant in mortgage deed.

It very frequently happens that the mortgage deed contains an express covenant that the mortgagor shall remain in possession until default in payment of the mortgage money *at a time certain*, and therefore, this covenant operating as a re-demise, until that time arrives the possession of his estate is secured to him: he becomes, in fact, a termor (*p*). But if he fail to redeem his pledge by the appointed day, he then becomes a tenant at sufferance to the mortgagee. "The situation of a lessee on the expiration of a term, and a mortgagor who has covenanted that the mortgagee may enter on a certain day, is precisely the same" (*q*). It must, however, be carefully noted that (in spite of a somewhat conflicting decision (*r*) of doubtful authority), except where there is an express and positive covenant that the mortgagor shall hold for a *determinate* period, there is no re-demise, and the mortgagor is but a tenant at sufferance from the time of the execution of the mortgage. Thus, where it was provided that, if the mortgagor should pay the principal and interest on the 25th March then next, the

(*o*) Thunder d. Weaver *v.* Belcher (1803), 3 East, 449.

(*p*) Wilkinson *v.* Hall (1837), 3 Bing. N. C. 508; 4 Scott, 301.

(*q*) Per Best, C. J., 3 Bing. p. 427.

(*r*) Doe d. Lyster *v.* Goldwin (1841), 2 Q. B. 143; 1 G. & D. 463.

mortgagee should re-convey, and there was also a covenant that *after default* the mortgagee might enter, it was held that the estate was in the mortgagee from the time of the execution of the mortgage (*s*).

There are, moreover, other special forms of agreement (*t*) giving rise to the existence of various relations between the parties, and which cannot now be discussed; but, whenever the mortgagor occupies the premises as tenant at sufferance or tenant at will to the mortgagee, it is clear that he can have no power of letting in subtenants, and, if any such are so let in by him, they may undoubtedly be treated by the mortgagee as tort-feasors. But this remark must be taken as subject to the provisions of the Conveyancing Act, 1881, to which allusion will presently be made. And it has been held that, where a mortgagor remaining in possession let the premises to a tenant who brought in trade fixtures, the tenant was entitled to remove the fixtures as against the mortgagee as well as against the mortgagor. See Sanders *v.* Davis (1885), 15 Q. B. D. 218; 54 L. J. Q. B. 576; Gough *v.* Wood, [1894] 1 Q. B. 713; 63 L. J. Q. B. 564; and Thomas *v.* Jennings (1896), 66 L. J. Q. B. 5; 75 L. T. 274.

Recognition of tenancy by mortgagee.

Supposing, however, the mortgagee in any way recognizes their tenancy (*u*), they become his tenants at the rent they agreed with the mortgagor to pay; and whether such recognition has indeed taken place is a question of fact for the consideration of a jury, but it would seem to be the better opinion that they would not be warranted in inferring it from the mere circumstance of the mortgagee's knowingly permitting the mortgagor to continue the apparent owner of the premises as before the mortgage (*x*).

Notice by mortgagee not enough.

It was once thought that a mortgagee had only to give him notice to make one of these persons his own tenant. But it is now clear that there must be some evidence of the man's consent; and that the tenancy which from the time of that consent begins, is a *new* tenancy and not merely a continuation of the old one between himself and the mortgagor (*y*).

(*s*) Doe d. Roylance *v.* Lightfoot (1841), 8 M. & W. 553; 5 Jur. 966.

(*t*) Jolly *v.* Arbuthnot (1859), 4 De G. & J. 224; 28 L. J. Ch. 547.

(*u*) Doe d. Whitaker *v.* Hales (1831), 7 Bing. 322; 5 M. & P. 132.

(*x*) Doe d. Rogers *v.* Cadwallader (1831), 2 B. & Ad. 473; 36 R. R. 633; Evans *v.* Elliot (1838), 9 A. & E. 342; 48 R. R. 520.

(*y*) Brown *v.* Storey (1840), 1 Scott, N. C. 9; 1 M. & G. 117; Waddilove *v.* Barnett (1836), 2 Bing. N. C. 538; 2 Scott, 763; Corbett *v.* Plowden (1884), 25 Ch. D. 678; 54 L. J. Ch. 109; and Towerson *v.* Jackson, [1891] 2 Q. B. 484; 61 L. J. Q. B. 36, where it was held that the mere fact of the tenant remaining in

As to the tenant of a mortgagor under a lease made *before* the mortgage, it may be remarked that, on the execution of the mortgage, he becomes tenant of the mortgagee, to whom the estate has been conveyed; and, therefore, the mortgagor could not maintain ejectment for a forfeiture. For, although it is a rule of law that a tenant cannot dispute the title of his landlord, yet he may confess and avoid it by showing that it is determined (*z*). It was formerly necessary that the tenant of the mortgagor should *attorn* to the mortgagee before the latter could claim rent from him, but it is now sufficient that the mortgagee should give the tenant *notice* to pay the rent to him (*a*).

Attornment clause in mortgage.

It often happens that the relation of landlord and tenant is created between the mortgagee and the mortgagor by means of the insertion of an attornment clause in the mortgage deed. The object of this is, of course, to give the mortgagee the benefit of the power of distress possessed by a landlord, and it is a perfectly legitimate device where the arrangement is *bonâ fide* and not a mere contrivance for giving a preference to the mortgagee in case of the bankruptcy or insolvency of the mortgagor (*b*). In such a case the mortgagee is entitled to distrain the goods even of a stranger (*c*). Under certain circumstances, however, such a document would require registration under the Bills of Sale Acts, 1878 and 1882 (*d*).

Act of 1881.

A considerable modification of the law connected with the subject-matter of this note was effected by the Conveyancing and Law of Property Act, 1881. It applies to mortgages made after the Act and *where no contrary intention is expressed in the mortgage deed*. Subject to the provisions of the Act, the mortgagor while in possession may, if he reserve the best available rent, grant certain leases to take effect in possession not later than twelve months after

possession after notice by the mortgagees to pay the rent to them does not establish an agreement to become their tenant.

(*z*) Doe d. Marriott *v.* Edwards (1834), 5 B. & Ad. 1065; 6 C. & P. 208.

(*a*) Rawson *v.* Eicke (1837), 7 A. & E. 451; 2 N. & P. 423; Cook *v.* Guerra (1872), L. R. 7 C. P. 132; 41 L. J. C. P. 89; Underhay *v.* Read (1888), 20 Q. B. D. 209; 57 L. J. Q. B. 129.

(*b*) *Ex parte* Voisey, *In re* Knight (1882), 21 Ch. D. 442; 52 L. J. Ch. 121; *In re* Stockton Iron Furnace Co. (1879), 10 Ch. D. 335; 48 L. J. Ch. 417.

(*c*) Kearsley *v.* Philips (1883), 11 Q. B. D. 621; 52 L. J. Q. B. 581.

(*d*) 41 & 42 Vict. c. 31; 45 & 46 Vict. c. 43. And see Hall *v.* Comfort (1886), 18 Q. B. D. 11; 35 W. R. 48; *In re* Willis, *Ex parte* Kennedy (1888), 21 Q. B. D. 384; 57 L. J. Q. B. 631; Mumford *v.* Collier (1890), 25 Q. B. D. 279; 59 L. J. Q. B. 552; Green *v.* Marsh, [1892] 2 Q. B. 330; 61 L. J. Q. B. 442; and *In re* Roundwood Colliery Co., [1897] 1 Ch. 373; 66 L. J. Ch. 186.

dato. For further information reference should be made to the statute itself (*e*), and also to the Tenants' Compensation Act, 1890 (53 & 54 Vict. c. 57).

Judicature Act, 1873.

The Judicature Act, 1873 (*f*), gives power to "a mortgagor entitled for the time being to the possession or receipt of the rents and profits of any land as to which no notice of his intention to take possession or to enter into the receipt of the rents and profits thereof shall be given by the mortgagee," to sue for such possession, to recover rent due to him, or to bring an action of trespass in his own name "unless the cause of action arises upon a lease or other contract made by him jointly with another person." It was held, however, in Matthews *v.* Usher (*g*), that this enactment does not empower a mortgagor to re-enter in his own name on a proviso for re-entry for breach of covenant.

It has been held that a mortgagor in receipt of rents and profits has a sufficient interest to enable him to maintain an action for an injunction to restrain an injury done to the mortgaged property, and that without joining the mortgagee as a party (*h*).

Joint Tenancy.

[24] MORLEY *v.* BIRD. (1798)

[2 Ves. 629; 4 R. R. 106.]

William Collins by his will gave all his property to his daughter Elizabeth, on condition that she paid to the four daughters of his brother John "*four hundred pounds out of seven now lying in the £3 per cent. consolidated.*"

Three of John's daughters having died during the testator's lifetime, it was held that Martha, the fourth

(*e*) 44 & 45 Vict. c. 41, s. 18. See the recent cases of Municipal Building Society *v.* Smith (1889), 22 Q. B. D. 70; 58 L. J. Q. B. 61; Wilson *v.* Queen's Club, [1891] 3 Ch. 522; 60 L. J. Ch. 698; and Browne *v.* Peto, [1900] 2 Q. B. 653; 69 L. J. Q. B. 869.

(*f*) Sect. 25, sub-sect. 5.

(*g*) [1900] 2 Q. B. 535; 69 L. J. Q. B. 856.

(*h*) Fairclough *v.* Marshall (1878), 4 Ex. D. 37; 48 L. J. Ex. 146.

daughter, who survived him, was entitled to the whole legacy given to the four daughters.

"Great doubts," said Sir R. P. Arden, M. R., "have been entertained by judges, both at law and in equity, as to words creating a joint tenancy or a tenancy in common; and it is clear the ancient law was in favour of a joint tenancy. And that law still prevails: unless there are some words to sever the interest taken, it is at this moment a joint tenancy, notwithstanding the leaning of the Courts lately in favour of a tenancy in common . . . . This is a legacy to four persons, and there are no words of severance; therefore it is a joint legacy, and the whole interest survives to the survivor, three being dead."

Characteristics of joint tenancy.

An estate in joint tenancy is one acquired by two or more persons in the *same land*, by the *same title* (not being a title by descent), at the *same period* and *without words importing that they are to take in distinct shares*. Joint tenants are not considered as holding in distinct shares, like tenants in common, but *each is equally entitled to the whole;* and it is from this entirety of interest that the most remarkable incident of joint tenancy, the right of survivorship, arises.

Right of survivorship.

Tenancy in common, though no words of severance.

But, although there may be no words of severance, special circumstances may sometimes justify the Courts in construing what seems to be a joint tenancy to be really a tenancy in common; *e.g.*, the purchase-money being advanced in unequal proportions (*i*), or the purchase being made for a joint undertaking (*k*), or, again, in the case of marriage articles (*l*).

Leases by joint tenants and tenants in common.

So far as the law of contracts is concerned, the most important aspect in which joint tenants and tenants in common can be regarded is as landlords, and on that branch of the subject the following remarks from a work of great authority in the profession may be quoted:—

"Joint tenants and tenants in common may, according to the interest they have, join or sever in making leases; and such leases bind, whether made to commence *in præsenti* or *in futuro*. If joint

(*i*) Lake *v.* Craddock (1732), 1 Lead. Cas. Eq. 205; 3 P. Wms. 158.

(*k*) Jefferey *v.* Small (1683), 1 Vern. 217.

(*l*) Liddard *v.* Liddard (1860), 28 Beav. 266.

tenants join in a lease, there is but one lease, and they all make but one lessor, for they have but one freehold; but if tenants in common join in a lease, there are several leases of their several interests; for although tenants in common cannot make a joint lease of the whole of their estate, yet if they join in a lease for years by indenture of their several lands, it is the lease of each for their respective parts and the cross-confirmation of each for the part of the other, and no estoppel on either part, because an actual interest passes from each respectively. There is no doubt that a demise by tenants in common, though joint in its terms, operates as a separate demise by each tenant in common of his undivided share, and a confirmation by each of his companions (*m*). Where joint tenants concur in granting a lease, the interest of the lease continues, notwithstanding the decease of either of the lessors, and the survivor is entitled to the whole rent (*n*). So, if the lease be at will, the death of one of the lessors does not operate as a countermand of the tenancy even for a moiety; all survives to the other, and if the lessee continues his possession, the survivor may maintain an action for the whole rent. But though each joint tenant is considered entitled to the whole while the joint tenancy continues, and is said to be seised 'per my et per tout,' yet, for the purposes of alienation, each has an exclusive right to, and dominion over, his own share or proportion; and therefore if one of two joint tenants make a lease of the whole, his moiety only will pass (*o*). So, a lease purporting to be made by both, and executed by one only, is a good lease for the moiety of him only who has executed.

"If one joint tenant make a lease of his moiety for years, and die before the lessee's entry, the lease will bind the survivor, and the lessee will retain his interest in the moiety demised until his term expire. And so one joint tenant may make a lease to commence after his death, and his co-tenant, if he survive, will be bound by it (*p*).

"One joint tenant or tenant in common may make a lease for years of his part to his companion" (*q*).

It should, however, be observed that there is no relationship of trust or agency in one co-owner of a property towards the other;

(*m*) Thompson *v.* Hakewill (1865), 19 C. B. N. S. 713; 35 L. J. C. P. 18.

(*n*) Doe *v.* Summersett (1830), 1 B. & Ad. 135; 8 L. J. K. B. 369.

(*o*) Bellingham *v.* Alsop (1605), Cro. Jac. 52.

(*p*) Clerk *v.* Clerk (1694), 2 Vern. 323.

(*q*) Cowper *v.* Fletcher (1865), 6 B. & S. 464; 34 L. J. Q. B. 187; Woodfall, Landl. & Ten. p. 13 (15th ed.).

and when one collects the rents of the whole he does so, not in the capacity of agent, but in that of owner (*r*).

A joint tenancy may be dissolved by *partition;* by *alienation without partition;* or by *accession of interest.* A joint tenant, however, *cannot leave his share by will,* because a will is of no force till the testator is dead, and then the right of survivorship, which accrued at the original creation of the estate, has a prior claim to be considered (*s*). If one of three joint tenants exercises his power of disposition in favour of a stranger, that person will then hold one undivided third part of the land as tenant in common with the remaining two (*t*).

(*r*) Kennedy *v.* De Trafford, [1897] A. C. 180; 66 L. J. Ch. 413.

(*s*) Swift *v.* Roberts (1764), 3 Burr. 1488.

(*t*) Wms. R. P. p. 138 (19th ed.).

Form of Contracts.

STATUTE OF FRAUDS.

Leases for more than Three Years not in Writing.

[25] RIGGE *v.* BELL. (1793)

[5 T. R. 471; 2 R. R. 642.]

By parol merely, Rigge let Hague's Farm in Yorkshire to Bell for seven years, and Bell entered and paid rent. But the tenant did not give satisfaction, and Rigge determined to get rid of him. By the terms of the agreement Bell was to go out at Candlemas; but Rigge's view was, as the lease, being for more than three years, and yet not in writing, as the Statute of Frauds required, operated merely as a tenancy at will, he could make the man quit when he pleased, and was not bound by the terms they had agreed on. In this view he found himself mistaken, for it was held that, "though the agreement be void by the Statute of Frauds as to the *duration* of the lease, it *must regulate the terms on which the tenancy subsists in other respects*, as to the rent, the time of the year when the tenant is to quit, &c."

CLAYTON *v.* BLAKEY. (1798) [26]

[8 T. R. 3; 4 R. R. 575.]

By parol merely, Clayton let Blakey some land for twenty-one years, and Blakey entered and paid rent. Two or three years afterwards his landlord gave him notice to quit, and, as he treated such notice with contempt, sued him for double rent for holding over. To this claim Blakey raised the defence that (by virtue of sect. 1 of the Statute of Frauds, which directs that any lease for more than three years not reduced into writing shall operate only as a tenancy at will) he was only a tenant at will, and ought to have been so described in the plaintiff's declaration. It was held, however, that Blakey was *not a tenant at will, but a yearly tenant*, and therefore the plaintiff's pleading was good enough to hit him.

"At common law a lease for years of corporeal hereditaments might have been made for any length of term by parol (*a*). But by the Statute of Frauds (*b*) it was enacted (*c*), that all *leases* not in writing, signed by the parties making them or their agents thereunto lawfully authorized by writing, should have the force, both at law and in equity, of *estates at will only*. Leases, however, not exceeding three years from the making thereof, whereon the reserved rent is equal to two-thirds at least of the improved value of the premises, are excepted (*d*), even though such leases may be only to commence *in futuro* (*e*); and if such a lease be made by parol its terms may always be proved by parol evidence (*f*). But a lease for three years to commence at a future day, as it exceeds three years 'from the making,' cannot be made by parol (*g*). The Statute of Frauds applies only where the tenancy must of necessity last more than three years, and not where, at the time of the arrangement, it may last for less, though it may last for more (*h*).

Statute of Frauds.

(*a*) Except leases by corporations.
(*b*) 29 Car. 2, c. 3.
(*c*) Sect. 1.
(*d*) Sect. 2.
(*e*) Ryley *v.* Hicks (1713), 1 Str. 651.
(*f*) Bolton *v.* Tomlin (1836), 5 A. & E. 856; 6 L. J. K. B. 45.
(*g*) Foster *v.* Reeves, [1892] 2 Q. B. 255; 61 L. J. Q. B. 763; Rawlins *v.* Turner (1699), 1 Ld. Ray. 736.
(*h*) *Ex parte* Voisey (1882), 21 Ch. Div. at p. 458; 52 L. J. Ch. 121, per Brett, L. J.

Nor, probably, do its provisions requiring a party's signature extend to leases under seal (*i*). A further Act passed in the year 1845 (8 & 9 Vict. c. 106), provides (*k*) that a lease required by law to be in writing shall be void at law unless made by deed. The Statute of Frauds, moreover (*l*), forbids an action to be brought upon any *agreement for a lease* for a term, however short, unless such agreement be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized" (*m*).

Payment of rent.

But the rigour of these statutory provisions has been considerably mitigated by the Courts both of Law and Equity, but in different ways. By Courts of Law, "estate at will," in the first section of the Statute of Frauds, was construed (as illustrated by the leading cases of Rigge *v.* Bell, and Clayton *v.* Blakey, *supra*) to mean an estate at will *in the first instance*, but that, when once created, it should be liable, like any other estate at will, to be changed into a tenancy from year to year by payment of rent or anything showing an intention to create a yearly tenancy. If, however, there were no circumstances showing such an intention, the estate would remain an estate at will (*n*).

Agreement followed by entry.

So, too, where, instead of a void lease, there was an *agreement*, whether valid or invalid under sect. 4 of the Statute of Frauds, *to grant a future lease*, followed by entry and payment of rent thereunder, the tenancy was likewise regarded as *primâ facie* a tenancy from year to year, upon such of the terms of the proposed lease as were applicable thereto (*o*).

Nor was the attitude of the Courts of Common Law in this matter altered by 8 & 9 Vict. c. 106, sect. 3; for the expression "void at law" in that section was construed by them to mean void *as a lease*, but valid as an agreement (*p*). The result, therefore, was that entry and payment of rent under a lease falling within this statute also created a tenancy from year to year.

Part performance in equity.

But the Courts of Equity went further still. By the extension to cases under the Statute of Frauds of the doctrine of part performance, any party to a lease, or to an agreement for a lease, void

(*i*) Aveline *v.* Whisson (1842), 4 M. & Gr. 801; 12 L. J. C. P. 58. See Williams's Real Property, p. 754 (19th ed.).

(*k*) Sect. 3.

(*l*) Sect. 4.

(*m*) See Foa on Landlord and Tenant, p. 8 (2nd ed.).

(*n*) See Roe *v.* Prideaux (1808), 10 East, 158; 10 R. R. 258; Smith *v.* Widlake (1877), 3 C. P. Div. 10; 47 L. J. Q. B. 282.

(*o*) Chapman *v.* Towner (1840), 6 M. & W. 100; 9 L. J. (N. S.) Ex. 54.

(*p*) Bond *v.* Rosling (1861), 1 B. & S. 371; 30 L. J. Q. B. 227; Rollason *v.* Leon (1861), 7 H. & N. 73; 31 L. J. Ex. 96; Tidey *v.* Mollett (1864), 16 C. B. N. S. 298; 33 L. J. C. P. 235, overruling Stratton *v.* Pettit (1855), 16 C. B. 420; 24 L. J. C. P. 182. Foa on Landlord and Tenant, p. 9.

under this statute but capable of being specifically enforced, who had given or taken possession thereunder, was not only held entitled to require the other party to execute a valid lease, but was treated as actual lessor or lessee under a valid lease from the time of possession being so taken (*q*). And the Courts of Equity further held, in this respect following the line taken by the Courts of Law, that a demise void as such under 8 & 9 Vict. c. 106, s. 3, was nevertheless valid as an agreement, and consequently capable of being specifically enforced (*r*). Thus, while *at law* the tenant who took possession under a void lease or under a mere agreement (whether valid or invalid) remained nothing more than a tenant at will until he had paid rent, and thenceforward became tenant from year to year—*in equity*, provided his claim to specific performance was one which could not be resisted, he was regarded as a tenant under the lease from the moment he took possession.

Judicature Act. Walsh *v.* Lonsdale.

Upon this state of things the Judicature Act supervened, and the effect of the fusion of law and equity upon this matter is very well illustrated in the leading case of Walsh *v.* Lonsdale (*s*). In delivering judgment, Sir G. Jessel, M. R., said: "A tenant holding under an agreement for a lease *of which specific performance would be decreed* (*t*), stands in the same position as to liability as if the lease had been executed. He is not, since the Judicature Act, a tenant from year to year; he holds under the agreement, and every branch of the Court must now give him the same rights. . . . There is an agreement for a lease under which possession has been given. Now, since the Judicature Act, the possession is held under the agreement. There are not two estates as there were formerly, one estate at common law by reason of the payment of the rent from year to year, and an estate in equity under the agreement. *There is only one Court, and the equity rules prevail in it.* The tenant holds under an agreement for a lease. He holds, therefore, under the same terms in equity as if a lease had been granted, it being a case in which both parties admit that relief is capable of being given by specific performance." The principle of Walsh *v.* Lonsdale has been followed in several subsequent cases (*u*), and is now well-established law.

(*q*) See per Jessel, M. R., in Walsh *v.* Lonsdale, *infra*.

(*r*) Browne *v.* Warner (1807), 14 Ves. 156, 409; 9 R. R. 259; Parker *v.* Taswell (1858), 2 De G. & J. 559; 27 L. J. Ch. 812; followed in Zimbler *v.* Abrahams, [1903] 1 K. B. 577; 72 L. J. K. B. 103.

(*s*) (1882), 21 Ch. D. 9; 52 L. J. Ch. 2.

(*t*) Coatsworth *v.* Johnson (1886), 55 L. J. Q. B. 220; 54 L. T. 520, shows that it is otherwise where that remedy is not available.

(*u*) See Lowther *v.* Heaver (1889), 41 Ch. Div. 248; 58 L. J. Ch. 482 Swain *v.* Ayres (1888), 21 Q. B. D. 289; 57 L. J. Q. B. 428; Allhusen

Tenancy at will, how created.

A tenancy at will is an estate in land determinable at the will either of landlord or tenant. It may arise either by implication or by express words. In Richardson *v.* Langridge (*x*) it was held that if an agreement be made to let premises *so long as both parties like, and reserving a compensation accruing de die in diem, and not referable to a year or any aliquot part of a year*, a tenancy at will is thereby created.

Determination of tenancy at will.

A tenancy at will may be determined by a demand of possession (*y*), or by the express declaration of either of the parties (*z*), or by implication of law: of the latter description will be the death of either party (*a*)—acts of ownership exercised by the landlord (*b*)—his alienation of the reversion and notice thereof (*c*), although the alienation be by way of mortgage only (*d*)—waste committed by the tenant (*e*)—his demising or leasing or assigning the premises over (*f*)—or, in short, doing any act which is inconsistent with an estate at will (*g*).

Tenancy by sufferance.

Tenancy *at will* must be distinguished from tenancy *by sufferance*, which is when a person, who has originally come into possession by a lawful title, holds possession after his title has determined.

Tacit extension of lease.

Where, on the expiration of a lease for a year, the tenant remains in possession with the consent of the landlord, and nothing is said or done inconsistent with his holding on under the terms of the lease, the implication of law is, that a tenancy from year to year has been created on the same terms in so far as they are not inconsistent with a tenancy from year to year (*h*).

v. Brooking (1884), 26 Ch. D. 559; 53 L. J. Ch. 520; *In re* Maughan (1885), 14 Q. B. D. 956; 54 L. J. Q. B. 128; and Crump *v.* Temple (1890), 7 T. L. R. 120.

(*x*) (1811), 4 Taunt. 128; 13 R. R. 570.

(*y*) See Doe *v.* Jones (1830), 10 B. & C. 718; 8 L. J. K. B. 310; Doe *v.* Price (1832), 9 Bing. 356; 2 M. & S. 464.

(*z*) Doe d. Bastow *v.* Cox (1847), 11 Q. B. 122; 17 L. J. Q. B. 3.

(*a*) Doe d. Stanway *v.* Rock (1842), 1 C. & M. 549; 4 M. & G. 30; James *v.* Dean (1805), 11 Ves. 391; 8 R. R. 178.

(*b*) Co. Lit. 55 b, 57 b, 245 b; cited 9 M. & W. 646; Doe d. Moore *v.* Lawder (1816), 1 Stark. 308.

(*c*) Dinsdale *v.* Isles (1674), 2 Lev. 88; 1 Vent. 247; Ball *v.* Cullimore (1835), 2 C. M. & R. 120; 4 L. J. (N. S.) Ex. 137; Doe d. Goody *v.* Carter (1847), 9 Q. B. 863; Doe d. Davies *v.* Thomas (1851), 6 Exch. 854; 20 L. J. Ex. 367.

(*d*) Jarman *v.* Hale, [1899] 1 Q. B. 994; 68 L. J. Q. B. 681.

(*e*) Co. Lit. 55 b.

(*f*) Pinhorn *v.* Souster (1853), 8 Exch. 763; 22 L. J. Ex. 266; Melling *v.* Leak (1855), 16 C. B. 652; 24 L. J. C. P. 187.

(*g*) Birch *v.* Wright (1786), 1 T. R. 382; 1 R. R. 223; Pollen *v.* Brewer (1842), 7 C. B. N. S. 371; 1 L. T. 9; Wallis *v.* Delmar (1860), 29 L. J. Ex. 276; and see Woodfall's Landlord and Tenant, p. 254 (17th ed.).

(*h*) See Dougal *v.* McCarthy,

Notice to quit.

Half-year's notice necessary.

Whole year's notice necessary under Agricultural Holdings Act, 1883.

A few words may be said as to the *notice to quit* necessary in the case of yearly tenants. Such a tenancy may at common law be determined by *half a year's notice* expiring at that period of the year at which the tenancy commenced. Where, however, the tenancy is within the Agricultural Holdings Act, 1883 (*i*), a year's notice is generally necessary. The 33rd section of that Act provides that:—

"Where a half-year's notice, expiring with a year of tenancy, is by law necessary and sufficient for determination of a tenancy from year to year, in the case of any such tenancy under a contract of tenancy made either before or after the commencement of this Act, a year's notice so expiring shall by virtue of this Act be necessary and sufficient for the same, unless the landlord and tenant of the holding, by writing under their hands, agree that this section shall not apply, in which case a half-year's notice shall continue to be sufficient; but nothing in this section shall extend to a case where the tenant is adjudged bankrupt, or has filed a petition for a composition or arrangement with his creditors" (*k*).

The construction placed upon this section is that it is limited to cases where a half-year's notice is *by law* necessary to determine the tenancy, and has no application to cases of *agreement* (*l*). A notice to quit given by one of several joint tenants on behalf of all, whether with the authority of the others or not, will put an end to the tenancy (*m*). So will notice by one of several executors or administrators on behalf of all, unless a joint notice is required in the lease (*n*). But notice by a mere receiver of rents is bad (*o*).

Joint tenants.

Executors.

Receiver.

Verbal notice good.

Construction of notices.

The notice may be a verbal one, though it had much better be in writing. The Courts are inclined to construe notices to quit liberally, so that trifling inaccuracies will be overlooked (*p*). The great point is that the tenant *should not be able to mistake the object*

[1893] 1 Q. B. 736; 62 L. J. Q. B. 462; applying the doctrine laid down by Lord Mansfield and Buller, J., in Right *v.* Darby (1786), 1 T. R. 159; 1 R. R. 169.

(*i*) 46 & 47 Vict. c. 61.

(*k*) A notice to quit under this section may be served upon the person to whom it is to be given by being sent through the post in a registered letter addressed to him at his last known place of abode in England. See Van Grutten *v.* Trevenen, [1902] 2 K. B. 82; 71 L. J. K. B. 514.

(*l*) Barlow *v.* Teal (1885), 15 Q. B. D. 501; 54 L. J. Q. B. 564; and see Wilkinson *v.* Calvert (1878), 3 C. P. D. 360; 47 L. J. C. P. 679.

(*m*) Doe d. Aslin *v.* Summersett (1830), 1 B. & Ad. 135; 8 L. J. K. B. 369.

(*n*) Right d. Fisher *v.* Cuthell (1804), 5 East, 491; 7 R. R. 752.

(*o*) Doe d. Mann *v.* Walters (1830), 10 B. & C. 626; 5 M. & R. 357.

(*p*) Doe d. Armstrong *v.* Wilkinson (1840), 12 Ad. & E. 743; Doe *v.* Kightley (1796), 7 T. R. 63; 1 Ch. 11.

Alternative notice.

of the notice. A notice to quit must be construed in accordance with the intention of the landlord (*q*). But a notice in the alternative, *e.g.*, requiring the tenant *either to quit or to pay an increased rent*, will not do. If, however, after telling him to quit, the landlord adds "*or I shall insist on double rent*," the notice is good (*r*). One must be a lawyer, perhaps, to appreciate this distinction.

Service of notice.

The notice need not be served personally. It may be left with and explained to a servant at the tenant's residence (*s*). It may be put under a door (if it comes into the tenant's hands within the proper time) (*t*), or sent through the post (*u*). Service on one joint tenant furnishes presumptive evidence that the notice reached the other (*x*). Where the premises have been underlet, the notice must be given to the lessee, not to the sub-lessee (*y*).

Monthly and weekly tenancies.

In the case of tenancies for less than a year, the length of the notice depends on the letting (*z*). A month's notice is necessary to determine a monthly tenancy (*a*), and a week's notice is necessary to determine a weekly tenancy (*b*).

Difference between a lease and a licence.

In order that an instrument may operate as a lease, it must confer the right to *exclusive* possession of the premises; otherwise, it is a licence, and not a lease. Thus, an agreement under which the owner of lace-machines hired standing room for them in a room in a factory—steam power to be supplied by the owner of the factory, *who reserved the right of entering the room* for the purpose of attending to the running gear—has been held (*c*) to be a licence and not a tenancy. On the other hand, an agreement to let "all the room and power" in a certain mill has been held (*d*) to take effect as a

(*q*) See Wride *v.* Dyer, [1900] 1 Q. B. 23; 69 L. J. Q. B. 17; following Doe *v.* Culliford (1824), 4 D. & R. 248; 44 R. R. 878; and dissenting from Doe *v.* Morphett (1845), 7 Q. B. 577; 14 L. J. Q. B. 345.

(*r*) Doe d. Matthews *v.* Jackson (1775), 1 Dougl. 175; Doe d. Lyster *v.* Goldwin (1841), 2 Q. B. 143; 1 G. & D. 463.

(*s*) Jones *v.* Marsh (1791), 4 T. R. 464; 2 R. R. 441; and see Tanham *v.* Nicholson (1872), L. R. 5 H. L. 561; 6 Ir. R. C. L. 188.

(*t*) Alford *v.* Vickery (1842), Car. & Marsh. 280.

(*u*) Papillon *v.* Brunton (1860), 5 H. & N. 518; 29 L. J. Ex. 265.

(*x*) Doe *v.* Watkins (1806), 7 East, 551; 8 R. R. 670.

(*y*) Pleasant d. Hayton *v.* Benson (1811), 14 East, 234; 12 R. R. 507.

(*z*) See Soames *v.* Nicholson, [1902] 1 K. B. 157; 71 L. J. K. B. 24, which was a case of a quarterly tenancy; and Adams *v.* Cairns (1901), 85 L. T. 10.

(*a*) Doe d. Parry *v.* Hazell (1794), 1 Esp. 94; 5 R. R. 722.

(*b*) Bowen *v.* Anderson, [1894] 1 Q. B. 164; 42 W. R. 236; explaining Sandford *v.* Clarke (1888), 21 Q. B. D. 398; 57 L. J. Q. B. 507; and following Jones *v.* Mills (1861), 10 C. B. N. S. 788; 31 L. J. C. P. 56; and see Harvey *v.* Copeland (1892), 30 L. R. Ir. 412; and Huffell *v.* Armistead (1835), 7 C. & P. 56; 48 R. R. 756.

(*c*) Hancock *v.* Austin (1863), 14 C. B. N. S. 634; 32 L. J. C. P. 252.

(*d*) Marshall *v.* Schofield (1882), 52 L. J. Q. B. 58; 47 L. T. 406.

demise. In deciding whether a transaction amounts to a letting or only to a licence, the question to be considered is whether, looking to the substance and context of the agreement, the owner intended to part with the possession of and control over the property, or whether the agreement is merely for the use of the property in a certain way and on certain terms while it remains in the possession and under the control of the owner (*e*). The Court will not look so much to the words as to the substance of the agreement (*f*); and although there are no express words giving a right to exclusive occupation, yet if the nature of the acts to be done by the grantee requires such a right, the agreement will be held to amount to a letting (*g*). On the other hand, although the parties use words appropriate to a lease, yet if from the whole agreement it appears that the grantor is to retain possession of the property and merely to give the grantee a concurrent right of user, the agreement will be held to amount to a licence only (*h*). In Wilson *v.* Tavener (*i*), an agreement to let A. erect a hoarding for a bill-posting and advertising station, and use a wall of a house for the same purpose, at a rental of £10 per annum, payable quarterly, on the usual quarter-days, was held to constitute a licence and not a tenancy, and that a three-months' notice to quit, expiring at the end of a year of the term, was a reasonable and valid notice to determine it.

Effect of acceptance of rent due subsequent to notice to determine tenancy of chattels.

In the recent case of Keith, Prowse & Co. *v.* National Telephone Co. (*k*), it was held that the demand and acceptance of rent *due subsequent* to a notice to determine a tenancy of chattels is a waiver of the notice; and, *semble*, that when a term in chattels has expired and rent has been subsequently accepted, a tenancy from year to year is created, and the tenant is entitled to six months' notice to determine the tenancy, whatever may have been the length of notice required during the continuance of the original tenancy (*l*).

Holding over by tenant told to go.

By 4 Geo. 2, c. 28, s. 1, "If a tenant for life or years *contumaciously* disregards his landlord's written requirement to give up the premises, and wrongfully holds over, he will be liable to pay

(*e*) Wells *v.* Kingston-upon-Hull (1875), L. R. 10 C. P. at p. 408; 44 L. J. C. P. 257.

(*f*) Smith *v.* St. Michael, Cambridge (1860), 3 E. & E. 390.

(*g*) Roads *v.* Trumpington (1870), L. R. 6 Q. B. 56, 64. See Fawcett's Landlord and Tenant, p. 84 (2nd ed.).

(*h*) Taylor *v.* Caldwell (1863), 3 B. & S. 826; 32 L. J. Q. B. 164; *post*, p. 225. See also Wood *v.* Leadbitter, *post*, p. 286.

(*i*) [1901] 1 Ch. 578; 70 L. J. Ch. 263. See also Lowe *v.* Adams, [1901] 2 Ch. 598; 70 L. J. Ch. 783.

(*k*) [1894] 2 Ch. 147; 63 L. J. Ch. 373; and see "Waiver of Forfeiture," *post*, p. 367.

(*l*) *Sed quære*, whether this doctrine is not, at least, stated in too general terms.

compensation at the rate of *double the yearly value*." The statute, however, does not apply to weekly tenancies (*m*), nor (probably) to a tenancy from quarter to quarter (*n*). It applies, however, to a tenancy from year to year (*o*). Moreover, it should be observed that the statute only applies to the case of a tenant who holds over *contumaciously, i.e.*, who holds over though he is conscious that he has no right to retain possession (*p*); and not where no fraud is intended and resistance to its resumption by the landlord is made under a fair claim of right (*q*). In the calculation of the double value, only the land and its appurtenances can be included; therefore not the value of the power of an engine let with a mill (*r*).

Holding over by tenant who has himself given notice of going.

By 11 Geo. 2, c. 19, s. 18, if a tenant who has given notice himself holds over, he will become liable to pay *double the yearly rent*. This statute applies only to those cases where the tenant has the power of determining his tenancy by a notice, and where he has actually given such a notice (*s*). But it applies to all kinds of tenancies (*t*).

Debt, Default, or Miscarriage.

[27] BIRKMYR *v.* DARNELL. (1704)

[6 Mod. 248; 2 Ld. Raym. 1085.]

"My friend, Mr. Lightfinger, wants a horse; will you lend him yours?" said Darnell, meeting Birkmyr one day in 1700. "Well, I don't mind," replied Birkmyr, "if

(*m*) Lloyd *v.* Rosbee (1810), 2 Camp. 453; 11 R. R. 764.

(*n*) Sullivan *v.* Bishop (1826), 2 C. & P. 359.

(*o*) See Ryal *v.* Rich (1808), 10 East, 48; Lake *v.* Smith (1805), 1 N. R. 174.

(*p*) Swinfen *v.* Bacon (1861), 6 H. & N. 846; 30 L. J. Ex. 368.

(*q*) Wright *v.* Smith (1805), 5 Esp. 203; 5 Dow, 344. (The marginal note of this case is incorrect.) But see Hirst *v.* Horn (1840), 6 M. & W. 393; 55 R. R. 672.

(*r*) Robinson *v.* Learoyd (1840), 7 M. & W. 48; 10 L. J. Ex. 166.

(*s*) Johnstone *v.* Huddleston (1825), 4 B. & C. 922; 7 D. & R. 411.

(*t*) Timmins *v.* Rawlinson (1765), 3 Burr. 1603; 1 W. Bl. 533.

you'll be responsible for his letting me have it safely back again." "Certainly I will," replied Darnell, emphatically.

On the faith of this collateral undertaking, Birkmyr lent Lightfinger the horse. It was not returned, so he sued Darnell as surety. This, however, did him no good, because he found that he ought to have taken Darnell's promise in writing in accordance with the 4th section of the Statute of Frauds, 29 Car. 2, c. 3 (*u*).

MOUNTSTEPHEN *v.* LAKEMAN. (1874) [28]

[L. R. 7 H. L. 17; 39 L. J. Q. B. 275.]

A builder was employed by the Brixham Board of Health to make a main sewer for them. He got his work finished, and the Board gave notice to the neighbouring householders that they must connect the drains of their houses with the main sewer, or the Board would do it for them at their expense.

The householders displayed the slackness common on such occasions; and Mr. Lakeman, the chairman of the Board, happening to meet the builder in the street a few days afterwards, the following conversation took place:— "Well, Mountstephen," said Lakeman, "you've done the main sewer very nicely for us; would you have any objection to making the connections too?" "Certainly not, sir; if you or the Board will order the work or become responsible for the payment." "*Well, then*," said Lakeman, "*go and do it; I will see you are paid*" (*x*).

(*u*) This section enacts, that "no action shall be brought whereby . . . . to charge the defendant upon any special promise to answer for the debt, default or miscarriage of another person . . . unless the agreement upon which such action shall be brought, or some memorandum or note thereof shall be in writing, and signed by the party to be charged therewith, or some other person thereunto by him lawfully authorized."

(*x*) This form of words makes no

Mountstephen, therefore, made the connections, the Board's surveyor superintending the progress of the work, and by-and-by he sent in his account to the Board, debiting them with the account. The Board, however, refused to pay, saying they had not authorized the work. Mountstephen, therefore, brought an action against Lakeman, and it was held that *Lakeman's words were evidence to sustain a claim against him personally*, and that they did not constitute a promise to pay the debt of another.

Who is primarily liable?

The test as to whether or not any undertaking for another should have been in writing is this:—*Does that other, after the undertaking has been made for him, remain primarily liable?* If (like the man who went off with the horse) he does, the undertaking cannot be sued on unless it is in writing; if (like the Brixham Board) he does not, it is binding, though not in writing. If I go with you to a tailor's, and say to the tailor, "Make this gentleman a pair of trousers, and *if he doesn't pay you, I will;*" in this case you clearly remain primarily liable, and I cannot be successfully sued as your surety, because my promise is not in writing. But supposing, when we go into the shop, I say, "Make this gentleman a pair of trousers, and *put them down to me*," here you are not primarily liable, and therefore the 4th section of the Statute of Frauds does not require my promise to be in writing.

Extinction of debt.

So, too, if the effect of the undertaking is *to extinguish another person's debt*, so that, though up to that time he has been liable, he remains so no longer, the undertaking is binding, though not in writing. If, for instance, under the old debtor laws, when the effect of a creditor's liberating a debtor, whom he had taken in execution, was to release the debt, Weakman promised to pay the amount of Hardup's debt to Holdfast, if Holdfast would release him from arrest; this promise was not within the statute, because the debt was gone by the discharge of the debtor out of custody, and Weakman remained solely liable (*y*).

So, too, if goods are furnished to a married woman under a contract not binding on her separate estate, or (not being necessaries)

difference if the undertaking be *really* collateral, for in Matson *v.* Wharam (1787), 2 T. R. 80; 1 R. R. 429, where the words were "*If you do not know him you know me, and I will see you paid*," the statute was considered to apply.

(*y*) Goodman *v.* Chase (1818), 1 B. & Ald. 297; 19 R. R. 322; and see Bird *v.* Gammon (1837), 3 Bing. N. C. 883; 6 L. J. C. P. 258.

to an infant at the defendant's request, the defendant's undertaking to pay for them is not collateral, because the married woman or infant is not primarily liable (*z*).

Keate *v.* Temple.

When the undertaking has been by word of mouth, it is for the jury to say whether or not the person for whose benefit the promise has been made is primarily liable: and this is a question of fact which, depending as it does on all the circumstances of the case, it is sometimes extremely difficult to decide. On this point a case that may usefully be compared with Mountstephen *v.* Lakeman is Keate *v.* Temple, where a Portsmouth tailor tried unsuccessfully to make a lieutenant in the navy pay for a quantity of coats supplied to his crew, the defendant having said, "I will see you paid at the pay-table" (*a*). Eyre, C. J., in delivering the judgment of the Court, said, "There is one consideration, independent of everything else, which weighs so strongly with me, that I should wish this evidence to be once more submitted to a jury. The sum recovered is £576 7*s.* 8*d.*, and this against a lieutenant in the navy; a sum so large that it goes a great way towards satisfying my mind that it never could have been in the contemplation of the defendant to make himself liable, or of the plaintiff to furnish the goods on his credit to so large an amount. . . . From the nature of the case it is apparent that the men were to pay in the first instance. . . . The question is, whether the plaintiff did not in fact rely on the power of the officer over the fund, out of which the men's wages were to be paid, and did not prefer *giving credit to that fund rather than to the lieutenant*, who, if we are to judge of him by others in the same situation, was not likely to be able to raise so large a sum."

Distinction between guarantee and indemnity.

The question whether an undertaking to be liable for another amounts to a *guarantee*, within the meaning of sect. 4 of the Statute of Frauds, or is simply an *indemnity*, is often very difficult to determine. The distinction has recently been dealt with by the Court of Appeal in two cases which will probably in future be considered as the leading cases on the subject. In Sutton *v.* Grey (*b*) the plaintiffs, a firm of stockbrokers, by a verbal agreement with the defendant, undertook to transact business and be answerable upon the Stock Exchange for customers whom the defendant should introduce, upon the terms that the defendant should receive half of the commission earned upon and be liable to the

Sutton *v.* Grey.

(*z*) Harris *v.* Huntback (1757), 1 Burr. 373.

(*a*) (1797), 1 Bos. & P. 158; and see Matson *v.* Wharam, *supra*.

(*b*) [1894] 1 Q. B. 285; 63 L. J. Q. B. 633. And see Halbronn *v.* International Horse Agency, Ld., [1903] 1 K. B. 270; 72 L. J. K. B. 90, as to the liability of a principal to indemnify an auctioneer against damages for a false representation as to the property sold.

plaintiffs for half the losses arising from such transactions. Owing to the default of a customer a loss was incurred by the plaintiffs, the half of which they sought to recover under this agreement; and it was held that the promise to be answerable for the losses was the ulterior consequence only to the agreement, the main object of which was to regulate the terms of the defendant's employment in respect of transactions in which he was interested; that, therefore, the contract was one of indemnity and not a promise to guarantee the debt of another person, and that sect. 4 of the Statute of Frauds did not apply. Lord Esher, M. R., in his judgment, referred with approval to the test laid down by Parke, B., in Couturier *v.* Hastie (*c*) (where it was held that the undertaking of a *del credere* agent, who vouches for the purchaser's solvency, is *not* within the statute; for though the undertaking may result in a liability to pay the debt of another, that is not the immediate object for which the consideration is given), which was stated to be *whether the person who makes the promise is, but for the liability which attaches to him by reason of the promise, totally unconnected with the transaction, or whether he has an interest in it independently of the promise.*

Del credere agent.

Guild *v.* Conrad.

In Guild *v.* Conrad (*d*) the defendant orally promised the plaintiff that, if he, the plaintiff, would accept certain bills for a firm in which the defendant's son was a partner, he, the defendant, would provide the plaintiff with funds to meet the bills. It was held that as this was a promise to be liable primarily or in any event for a debt for which another person was already or was to become liable, irrespective of the question whether or not that person failed to satisfy that liability, it was an indemnity and not a guarantee, and consequently need not be in writing.

Promise to debtor not within statute.

The undertaking, to be within the statute, must be given *to the creditor*. The leading case on this subject is Eastwood *v.* Kenyon (*e*), where the defendant promised the plaintiff to see to the settlement of a debt which the latter owed to a third person. The promise was held to be binding, though not in writing. So, in another case, a man promised a bailiff that, if he would not arrest a relative of the former's for non-payment of a judgment debt, he would pay the money himself. This promise, also, was held not to require writing, because not made to the original creditor (*f*).

(*c*) (1852), 8 Ex. 40; 22 L. J. Ex. 97. See, also, per Cockburn, C. J., in Fitzgerald *v.* Dressler (1859), 7 C. B. N. S. 374; 29 L. J. C. P. 113.

(*d*) [1894] 2 Q. B. 885; 63 L. J. Q. B. 721.

(*e*) (1840), 11 Ad. & E. 438; 3 P. & D. 276. See, also, Hargreaves *v.* Parsons (1845), 13 M. & W. 561; 14 L. J. Ex. 250.

(*f*) Reader *v.* Kingham (1862),

Again, in the case of *In re* Hoyle (*g*), a partner in a firm agreed to indemnify the firm against certain debts owing by a named person to the firm; and this contract was held not to be a promise to answer for the debt of another person within the 4th section of the Statute of Frauds. "I think," said Bowen, L. J., "that to bring a promise within the statute, the debt for which the defendant has promised to answer must be a debt due to the person to whom the promise is made, and that the promise must be made to a person who could bring an action for the debt." *In re* Hoyle.

When the obligation to pay the debt of another is only an incident of a larger contract, the case is an exception from sect. 4 of the Statute of Frauds; but when the only object of the contract is to obtain forbearance from the creditor in respect of his debt, the motives which led the promisor to enter into the contract cannot enlarge its object or subject-matter so as to take the case out of the statute. The recent case of Harburg Indiarubber Comb Co. *v.* Martin (*h*) is a good illustration on this point: The defendant verbally promised the plaintiffs that he would indorse bills for the amount of the debt if they would not proceed to execution on a judgment debt recovered against a limited company in the success of which the defendant was largely interested both as a shareholder and creditor, but on the property of which the defendant had no security. The Court of Appeal held this promise to be within sect. 4 of the Statute of Frauds. Obtaining forbearance from creditor.

It should also be observed that the statute only applies to promises on which actions at law could be maintained, and not to promises which could only be enforced by a suit in equity (*i*).

Before a guarantee can become binding on the guarantor it *must be accepted* by the person to whom it is offered. A man once wrote to some publishers at Derby the following letter:— Guarantee must be accepted.

"*Gentlemen*, "*Doncaster, July 5th*, 1833.

"*Mr. France informs me that you are about publishing an arithmetic for him and another person, and I have no objection to*

13 C. B. N. S. 344; 32 L. J. C. P. 108; and see Thomas *v.* Cook (1828), 8 B. & C. 728; 3 M. & R. 444; followed and approved in Guild *v.* Conrad, *supra*; but see and compare Green *v.* Cresswell (1839), 10 Ad. & E. 453; 9 L. J. Q. B. 63; and Cripps *v.* Hartnoll (1862), 2 B. & S. 679; 31 L. J. Q. B. 150; which were cases of indemnities given to persons for becoming bail. See further as to the validity of such agreements, Consolidated Exploration Co. *v.* Musgrave, [1900] 1 Ch. 37, 69 L. J. Ch. 11; *post*, p. 184.

(*g*) [1893] 1 Ch. 84; 62 L. J. Ch. 182.

(*h*) [1902] 1 K. B. 778; 71 L. J. K. B. 520.

(*i*) See per Lindley, L. J., in *Re* Hoyle, *supra*.

being answerable as far as £50. For my reference apply to Messrs. Brooke & Co., of this place.

"*I am, Gentlemen, your most obedient servant,*

"*Geo. Tinkler.*

"*Witness to Mr. Tinkler,*

"*J. Brooke.*

"*To Messrs. Mozley & Son, Derby.*"

Mozley & Son vouchsafed no reply to this letter, but proceeded to publish the arithmetic. It was held, in an action which they afterwards brought against Tinkler, that they could not treat his letter as a guarantee because they *had never accepted it* (*k*).

Torts. It is to be observed that the words of the statute ("debt, default, or miscarriage") *do not refer exclusively to contracts.* Accordingly, if my friend Jones wrongfully takes Brown's horse and injures it, and I then promise Brown to pay the damage if he will not take proceedings against Jones, I am not bound unless I promise in writing (*l*).

As to the release of a surety, and contribution between co-sureties, see *post*, pp. 390, 396.

The Memorandum or Note in Writing.

[29] WAIN *v.* WARLTERS. (1804)

[5 East, 10; 1 Smith, 299.]

Warlters had a friend named Hall, who became indebted to Wain & Co. to the extent of £56, and with no particular means of payment. To extricate this friend from his difficulties Warlters wrote out the following collateral security:—

"*Messrs. Wain & Co.,*

"*I will engage to pay you by half-past four this day* £56 *and expenses on bill that amount on Hall.*

"(*Signed*) *Jonathan Warlters.*

"*No. 2 Cornhill, April 30th*, 1803."

(*k*) Mozley *v.* Tinkler (1835), 1 C. M. & R. 692; 5 Tyr. 416; and see M'Iver *v.* Richardson (1813), 1 M. & S. 557.

(*l*) Kirkham *v.* Marter (1819), 2 B. & Ald. 613; 1 Chit. 382.

Hall did not pay the money. So Wain & Co. sued Warlters on his guaranty. But the document was held to be mere waste paper, *as no consideration for Warlters' promise to pay the £56 was expressed in it.*

The Statute of Frauds requires that "the agreement" shall be in writing; and obviously *the consideration* is as much a part of the agreement as *the promise*. But though Wain *v.* Warlters is therefore a perfectly correct interpretation of the statute, the law on the subject (so far as regards *guaranties*) has been changed by the Mercantile Law Amendment Act of 1857 (*m*). Guarantors were always wriggling out of their engagements (as Warlters did) by technical defences, and, to put a stop to such dishonesty, it was enacted that, *provided a consideration did in fact exist, it need not be put into the document*, but might be proved by oral evidence. The promise, however, must still be in writing just as much as before (*n*).

Consideration need not appear.

Wain *v.* Warlters is generally considered the leading case on the "memorandum or note in writing" spoken of in the Statute of Frauds. It is necessary that this memorandum should have been made *before the commencement of the action* (*o*). It need not be very precise in its terms, the principle being that it is *just such a memorandum as merchants in the hurry of business might be supposed to make*. It is necessary, however, that *the names* of both parties, or, at all events, a clear *description* of them, should appear (*p*). If the vendor is described in the contract as "proprietor," "owner," "mortgagee," or the like, the description is sufficient, although he is not named; but if he is described as "vendor," or as "client," or "friend" of a named agent, that is not sufficient; the reason given being, in the language of Lord Cairns, that the former description "is a statement of matter of fact, as to which there can be perfect certainty, and none of the dangers struck at by the Statute of Frauds can arise"; the reason against the latter description being that, in order to find out who is the vendor, client, or friend, you must go into evidence on which there might possibly, as in Potter *v.* Duffield (*q*), be a conflict, and that, says the late

The memorandum or note in writing.

Before action.

Names or description.

(*m*) 19 & 20 Vict. c. 27, s. 3.

(*n*) Holmes *v.* Mitchell (1859), 7 C. B. N. S. 361; 28 L. J. C. P. 301.

(*o*) Bill *v.* Bament (1841), 9 M. & W. 36; 11 L. J. Ex. 81; Lucas *v.* Dixon (1889), 22 Q. B. D. 357; 58 L. J. Q. B. 161.

(*p*) Vandenbergh *v.* Spooner (1866), L. R. 1 Ex. 316; 35 L. J. Ex. 201; Sale *v.* Lambert (1874), L. R. 18 Eq. 1; 43 L. J. Ch. 470; Rossiter *v.* Miller (1878), 3 App. Cas. 1124; 48 L. J. Ch. 10.

(*q*) (1874), L. R. 18 Eq. 4; 43 L. J. Ch. 472.

Master of the Rolls in the last-named case, "is exactly what the Act says shall not be decided by parol evidence." "I should be thrown," he continues, "on parol evidence to decide who sold the estate, who was the party to the contract, the Act requiring that fact to be in writing" (*r*). So, too, when upon a contract for a mortgage of land, the solicitor for the intending mortgagor wrote a letter in which he said that he had called on "the solicitors to the proposing lender, and had arranged the proposed loan," it was recently held (*s*) not to be a sufficient description of the intended mortgagee. On the other hand, reference should be made to the recent case of Carr *v.* Lynch (*t*), where a landlord signed and handed to his tenant the following memorandum:—

Carr *v.* Lynch.

"*Dear Sir,*

"*In consideration of you having this day paid me the sum of £50, I hereby agree to grant you a further lease of 24 years of the Warden Arms to run immediately after the expiration of the now existing lease.*"

The then lessee of the premises had in fact paid the £50; but the name of the proposed lessee was not stated in the memorandum. It was held under these circumstances that the proposed lessee was sufficiently described as the person who had paid the £50, as his identity could not be fairly disputed, and consequently that the statute was satisfied. *The terms* also must be stated, *e.g.*, the price, if settled (*u*). In Ashcroft *v.* Morrin (*x*), it was held that an order for goods "on moderate terms" was sufficient to satisfy the statute. The *subject-matter* of a contract of sale need not be described very precisely, parol evidence being admissible for the purpose of identification. Thus, "the property in Cable Street" (*y*), "the house in Newport" (*z*), and "the land bought of Mr. Peters" (*a*), have been held to be sufficient descriptions. And on this point reference should be made to the judgments delivered in

Terms.

Subject-matter.

(*r*) Per Kay, J., in Jarrett *v.* Hunter (1886), 34 Ch. D. 182; 56 L. J. Ch. 141. See also Stokell *v.* Niven (1889), W. N. 46, 100; 61 L. T. 18; Coombs *v.* Wilkes, [1891] 3 Ch. 77; 61 L. J. Ch. 42.

(*s*) Pattle *v.* Anstruther (1894), 69 L. T. 174; 4 R. 470.

(*t*) [1900] 1 Ch. 613; 69 L. J. Ch. 345.

(*u*) Elmore *v.* Kingscote (1826), 5 B. & C. 583; 8 D. & R. 343; Acebal *v.* Levy (1834), 10 Bing. 376; 4 M. & S. 217; but see Hoadley *v.* McLaine (1834), 10 Bing. 482; 4 M. & S. 340.

(*x*) (1842), 4 M. & G. 450; 6 Jur. 783.

(*y*) Bleakley *v.* Smith (1840), 11 Sim. 150.

(*z*) Owen *v.* Thomas (1834), 3 M. & K. 353; 3 L. J. (N. S.) Ch. 205.

(*a*) Rose *v.* Cunynghame (1805), 11 Ves. 559.

the Court of Appeal in the recent case of Plant *v.* Bourne (*b*), where the written agreement was to sell and purchase "twenty-four acres of land, freehold, at T., in the parish of D., possession to be had on March 25th next. The vendor guaranteeing possession accordingly"; and it was held that parol evidence was admissible to show what was the subject-matter of the contract. But a written memorandum of an agreement by a company to employ a managing director for a term of five years is not sufficient within the statute unless it shows the date at which the service is to begin (*c*). A memorandum may be sufficient although addressed to a third party (*d*), and even though repudiating a contract (*e*). Plant *v.* Bourne.

The signature may come in any part of the document, even at the top, as "*I, James Crockford, agree to sell*" (*f*). But it must govern every part of the instrument (*g*). It may be by initials (*h*) (probably) or mark (even though the person can write (*i*)), and it may be printed or stamped (*k*). But there must be something in the nature of a signature. A letter beginning "*My dear Robert*," and ending with the words "*Do me the justice to believe me the most affectionate of mothers*," without the writer's name appearing in it, was held insufficient (*l*). "It is not enough," said the Court, "that the party may be identified. He is required to sign. And after you have completely identified, still the question remains, whether he has signed or not." A telegram is a sufficient (*m*) memorandum, and even a recital in a will may be sufficient (*n*). Signature.

In the case of Evans *v.* Hoare (*o*), the following document was drawn up by a clerk of the defendant's, named Harding, who was acting with the defendant's authority, and presented by Evans *v.* Hoare.

(*b*) [1897] 2 Ch. 281; 66 L. J. Ch. 643. See also Ogilvie *v.* Foljambe (1817), 3 Mer. 53; 17 R. R. 13; and Shardlow *v.* Cotterell (1881), 20 Ch. D. 90; 51 L. J. Ch. 353.

(*c*) *In re* Alexander's Timber Co. (1901), 70 L. J. Ch. 767; 8 Manson, 392. *Semble*, the memorandum should also contain some definition of the nature of the service.

(*d*) Gibson *v.* Holland (1865), L. R. 1 C. P. 1; 35 L. J. C. P. 5.

(*e*) Bailey *v.* Sweeting (1861), 9 C. B. N. S. 857; 30 L. J. C. P. 150; Elliott *v.* Dean (1884), 1 C. & E. 283.

(*f*) Knight *v.* Crockford (1794), 1 Esp. 190; 5 R. R. 729.

(*g*) Caton *v.* Caton (1867), L. R. 2 H. L. 127; 36 L. J. Ch. 886.

(*h*) See Smith's L. C. vol. I. p. 335 (11th ed.).

(*i*) Baker *v.* Dening (1838), 8 Ad. & E. 94; 7 L. J. (N. S.) Q. B. 137.

(*k*) Saunderson *v.* Jackson (1800), 2 B. & P. 238; 3 Esp. 180.

(*l*) Selby *v.* Selby (1817), 3 Mer. 2; 17 R. R. 1.

(*m*) Godwin *v.* Francis (1870), L. R. 5 C. P. 295; 39 L. J. C. P. 121.

(*n*) *In re* Hoyle, [1893] 1 Ch. 84; 62 L. J. Ch. 182.

(*o*) [1892] 1 Q. B. 593; 61 L. J. Q. B. 470. And see Schneider *v.* Norris (1814), 2 M. & S. 286; 15 R. R. 250.

Harding to the plaintiff for signature, and duly signed by the plaintiff:—

"5, *Campbell Terrace, Leytonstone, E.*
"*Feb.* 19, 1890.

"*Messrs. Hoare, Man & Co.*, 26, 29, *Budge Row, London, E.C.*

"*Gentlemen,—In consideration of your advancing my salary to the sum of* £130 *per annum, I hereby agree to continue my engagement in your office for three years, from and commencing January* 1, 1890, *at a salary at the rate of* £130 *per annum aforesaid, payable monthly as hitherto.*

"*Yours obediently,*
"*George E. Evans.*"

In an action for wrongful dismissal, it was held that the defendants' name, inserted in the letter by their authorized agent, amounted to a signature binding on the defendants within sect. 4 of the Statue of Frauds, and that plaintiff was entitled to recover.

Hucklesby *v.* Hook. But this case was recently distinguished in Hucklesby *v.* Hook (*p*), where an offer to purchase land written on paper containing the printed name and address of the vendor, was held not to be a sufficient memorandum to satisfy the statute, as it was not proved to have been written at the vendor's dictation.

The signature required is that of "the party to be charged" only, so that the party who has not signed, and would not be bound himself, can enforce the contract against the party who has signed (*q*). A signed proposal accepted verbally will satisfy the

Signature by agent. statute (*r*). The memorandum need not be signed by the party to be charged himself; it may be signed by "some other person thereunto by him lawfully authorized." "For the purpose of satisfying the Statute of Frauds," said Romer, J., in the recent case of Filby *v.* Hounsell (*s*), "it appears to me sufficient, so far as parties are concerned, that the written contract should show who the contracting parties are, although they or one of them may be agents or agent for others, and it makes no difference whether you can gather the fact of agency from the written document or not. Who the principals are may be proved by parol. That is well settled. This was pointed out by Wood, V.-C., in Morris *v.* Wilson (*t*), and by Sir George Jessel in Commins *v.* Scott (*u*), where he says: 'There can be no doubt that if a written contract

(*p*) (1900), 82 L. T. 117.

(*q*) Lavthoarp *v.* Bryant (1836), 2 Bing. N. C. 735; 3 Scott, 238.

(*r*) Reuss *v.* Picksley (1866), L. R. 1 Ex. 342; 35 L. J. Ex. 218.

(*s*) [1896] 2 Ch. at p. 740; 65 L. J. Ch. 852; distinguishing Potter *v.* Duffield, *supra*.

(*t*) (1859), 5 Jur. N. S. 168.

(*u*) (1875), L. R. 20 Eq. 15, 16; 44 L. J. Ch. 563.

is made in this form, "A. B. agrees to sell Blackacre to C. D. for £1,000," then E. F. the principal of A. B. can sue G. H. the principal of C. D. on that contract.'" This authority may be conferred without writing. But one of the contracting parties cannot be the other's agent for the purpose of signing (*x*); and for this reason an auctioneer cannot successfully sue on a contract which he has signed as agent (*y*); and although under ordinary circumstances the auctioneer's clerk is not the purchaser's agent, yet there may exist special circumstances from which the clerk's authority to sign may be inferred, so as to entitle the auctioneer to sue (*z*).

One party cannot be the other's agent.

Many contracts are made through brokers, and, when a broker is the agent of both parties, his signature binds them. A broker—according to the general practice—first makes an entry of the contract in his book and signs it, and then sends a copy to each party, the "bought note" to the buyer and the "sold note" to the seller; and these notes, if they agree, constitute a sufficient memorandum to satisfy the statute (*a*). If they do not agree, but vary materially, they do not constitute a binding contract (*b*). If there are no bought and sold notes, or if they disagree, it seems that recourse may be had to the entry in the broker's book (*c*).

Bought and sold notes.

The terms of a contract, it is to be observed, need not all appear in the same document. But the connection between various documents cannot be proved by oral evidence (*d*).

Different documents.

An envelope, however, and a letter which is shown by evidence to have been inclosed in it, are so connected together that the envelope may be used to supply the name of one of the parties to a memorandum in writing of a contract within either sect. 4 of the Statute of Frauds or sect. 4 of the Sale of Goods Act, 1893 (*e*). "The envelope," said Lopes, L. J., "was a necessary concomitant of the letter, which without it would not have reached its destination, and I think *they must be taken together as one document*." "It is a matter of common knowledge," said Chitty, L. J., "that

Envelope and letter one document.

(*x*) Sharman *v.* Brandt (1871), L. R. 6 Q. B. 720; 43 L. J. Q. B. 312.

(*y*) Farebrother *v.* Simmons (1822), 5 B. & Ald. 333; 24 R. R. 399.

(*z*) Bird *v.* Boulter (1833), 4 B. & Ad. 443; 1 N. & M. 313; Peirce *v.* Corf (1874), L. R. 9 Q. B. at p. 215; 43 L. J. Q. B. 52; Sims *v.* Landray, [1894] 2 Ch. 318; 63 L. J. Ch. 535; but see Bell *v.* Balls, [1897] 1 Ch. 663; 66 L. J. Ch. 397; and Potter *v.* Peters (1895), 64 L. J. Ch. 357; 72 L. T. 624.

(*a*) Rucker *v.* Cammeyer (1794), 1 Esp. 105.

(*b*) Grant *v.* Fletcher (1826), 5 B. & C. 436; 8 D. & R. 59.

(*c*) Sievewright *v.* Archibald (1851), 17 Q. B. 103; 20 L. J. Q. B. 529.

(*d*) See Boydell *v.* Drummond, *post*, p. 124.

(*e*) Pearce *v.* Gardner, [1897] 1 Q. B. 688; 66 L. J. Q. B. 457.

formerly letters were written on one sheet of paper, which was folded up and indorsed with the name and address of the person to whom it was to be sent. Subsequently, about 1840, adhesive envelopes were introduced, and since then the old method has to some extent come into use again as a combination of letter and adhesive envelope. In my opinion it would be contrary to good sense to hold that there is any distinction between the effect produced by these three methods of sending a letter."

Jones *v.* Joyner.

And in the recent case of Jones *v.* Joyner, in the Divisional Court (*f*), where a purchaser of goods signed a memorandum in a paper book, in which orders were generally put, slipped into a leather cover, the name of the seller not appearing in the memorandum, but being stamped upon the cover, the statute was held to have been satisfied.

Difference in wording between 4th and 17th sections.

It should be noticed that there is a difference in the wording between the 4th and the 17th sections. The 4th says merely, "*no action shall be brought*," while the 17th declares that no contract within it shall be "*allowed to be good*." The 4th section, therefore, refers only to the procedure, and does not affect the intrinsic validity of the contract (*g*); and now, by sect. 4 of the Sale of Goods Act, 1893 (*h*), which has replaced the 17th section of the Statute of Frauds, the words are, "A contract . . . . *shall not be enforceable by action unless*," &c.

Contract contained in several Documents.

[30]

BOYDELL *v.* DRUMMOND. (1809)

[11 East, 142; 2 Camp. 157.]

This action was brought by some publishers against a person who had agreed to take a quantity of Shaksperian engravings, coming out periodically during a number of

(*f*) (1900), 82 L. T. 768. And see Sarl *v.* Bourdillon (1845), 1 C. B. N. S. 188; 26 L. J. C. P. 78.

(*g*) Leroux *v.* Brown (1852), 12 C. B. 801; 22 L. J. C. P. 1; and see Williams *v.* Wheeler (1860), 8 C. B. N. S. 299; and Britain *v.* Rossiter (1879), 11 Q. B. D. 123; 48 L. J. Ex. 362.

(*h*) 56 & 57 Vict. c. 71.

years. It was necessary to the publishers' case to show that the agreement was *in writing*, as it was in its terms *incapable of performance* within the year. There had been a prospectus which the defendant had seen, and a "Shakspeare subscribers, their signatures" book, in which he had entered his name; and the plaintiffs thought this would do. It was held, however, that as there was no means *of connecting the "Shakspeare Subscribers" book with the prospectus without oral evidence*—no reference being made by the one to the other—they did not constitute a sufficient memorandum.

Another point the publishers tried to make was that, as the defendant had taken and paid for several numbers, there was sufficient "*performance*" to satisfy the statute. But it was held that *part performance* would not do, for *performance* could not mean anything less than *completion*.

Connected in sense.

This case is the leading authority for the rule that, though a contract may be collected from several documents, those documents must be *so connected in sense that oral evidence is unnecessary to show their connection;* in other words, they must be left to speak for themselves (*i*). In Oliver *v.* Hunting (*k*), Kekewich, J., thought that modern decisions have extended this principle, and remarked, "Wherever parol evidence is required to connect two written documents together, then that evidence is admissible. You are entitled to rely upon a written document, which requires explanation. Perhaps the real principle upon which that is based is, that you are always entitled, in regarding the construction and meaning of a written document, to inquire into the circumstances under which it was written, not in order to find an interpretation by the writer of the language, but to ascertain from the surrounding facts and circumstances with reference to what, and with what intent, it must have been written. I think myself that must be the principle on which parol evidence of this kind is admitted." The following cases also should be consulted, namely, Jones *v.* Victoria Graving Dock (1877), 2 Q. B. D. 314, 324; 46 L. J. Q. B. 219; Rishton *v.* Whatmore (1878), 8 Ch. D. 467; 47 L. J. Ch. 629;

Oliver *v.* Hunting.

(*i*) See Taylor *v.* Smith, [1893] 2 Q. B. 65; 61 L. J. Q. B. 331.

(*k*) 1890; 44 Ch. D. 205; 59 L. J. Ch. 255.

Wylson *v.* Dunn (1887), 34 Ch. D. 569; 56 L. J. Ch. 855; Potter *v.* Peters, (1895) 64 L. J. Ch. 357; 72 L. T. 624; and John Griffiths Cycle Corporation *v.* Humber, [1899] 2 Q. B. 414; 68 L. J. Q. B. 959.

Ridgway *v.* Wharton.

"The statute," said Cranworth, C., in an important case (*l*), "is not complied with unless the whole contract is either embodied in some writing signed by the party, *or in some paper referred to in a signed document, and capable of being identified by means of the description of it contained in the signed paper.* Thus, a contract to grant a lease on certain specified terms is, of course, good. So, too, even if the terms are not specified in the written contract, yet if the written contract is to grant a lease on the terms of the lease or written agreement under which the tenant now holds the same, or on the same terms as are contained in some other designated paper, then the terms of the statute are complied with. The two writings in the case I have put become one writing. Parol evidence is, in such a case, not resorted to for the purpose of showing what the terms of the contract are, but *only in order to show what the writing is which is referred to.* When that fact, which, it is to be observed, is a fact collateral to the contract, is established by parol evidence, the contract itself is wholly in writing signed by the party."

Long *v.* Millar.

In a case in which the question was whether a person had broken a contract to sell some land to a builder, it was held that an imperfect and irregular document, purporting to be an agreement by the builder to purchase and pay a deposit, was sufficiently connected with a receipt for the deposit which the seller had signed to form a binding agreement (*m*). So, in Cave *v.* Hastings (*n*), which was an action for breach of an agreement to hire a carriage for a year, it was held that a letter of the defendant's to the plaintiff referring to "our arrangement for the hire of your carriage" was sufficiently connected with a document setting forth the terms of the agreement. Studds *v.* Watson (1884), 28 Ch. Div. 305; 54 L. J. Ch. 626; and Craig *v.* Elliott (1885), 15 L. R. Ir. 257, are to the same effect.

Where writing not record of *any* bargain,

Parol evidence is always admissible to show that the writing which purports to be a note or memorandum of the bargain is not the record of any antecedent parol contract at all (*o*); for, as was

(*l*) Ridgway *v.* Wharton (1857), 3 D. M. & G. 677; 6 H. L. C. 238; and see Hussey *v.* Horne-Payne (1879), 4 App. Cas. 311; 48 L. J. Ch. 846; and Lever *v.* Koffler, [1901] 1 Ch. 543; 70 L. J. Ch. 395.

(*m*) Long *v.* Millar (1879), 4 C. P. D. 450; 48 L. J. C. P. 596; and see Sheers *v.* Thimbleby (1897), 76 L. T. 709.

(*n*) (1881), 7 Q. B. D. 125; 50 L. J. Q. B. 575; but see Coombs *v.* Wilkes, [1891] 3 Ch. 77; 61 L. J. Ch. 42.

(*o*) Pym *v.* Campbell (1856), 6 E.

said by Lord Selborne in Jervis *v.* Berridge (*p*), the Statute of Frauds "is a weapon of defence, not offence, and does not make any signed instrument a valid contract by reason of the signature, if it is not such according to the good faith and real intention of the parties" (*q*).

or of *whole* bargain.

So, too, it is clear that parol evidence is admissible for the purpose of showing that the writing is not a note or memorandum of the *whole* bargain (*r*); though it is inadmissible to supplement an *imperfect* note (*s*), except in the manner and to the extent already mentioned. It is generally (*t*), though not always (*u*), necessary to plead the Statute of Frauds, or sect. 4 of the Sale of Goods Act, when it is intended to be relied upon.

Pleading.

Part performance.

On the effect of part performance the equity leading case of Lester *v.* Foxcroft (*x*) should be referred to. Courts of Equity have long been in the habit, when there were acts of part performance and the nature of the case seemed to require equitable interference, of decreeing specific performance of verbal agreements unenforceable at law, by reason of the 4th section of the Statute of Frauds, as being contracts concerning land. The general rule is, that, to justify such interference, the parties must, by reason of the Act relied on, be in a position unequivocally different from that in which, according to their legal rights, they would have been if there were no contract (*y*). In such cases the Court will try and ascertain what was the oral contract between the parties, and then will give effect to it (*z*). But, as has been often observed, the Court *will enforce, but cannot make,* contracts; and therefore, where the contract is incomplete or its terms uncertain, specific performance will not be

& B. 370; 25 L. J. Q. B. 277; Wake *v.* Harrop (1861), 6 H. & N. 768; 30 L. J. Ex. 273; Clever *v.* Kirkman (1876), 33 L. T. 672; 24 W. R. 159; Hussey *v.* Horne-Payne (1879), 4 App. Cas. 311; 48 L. J. Ch. 846; per Lord Cairns.

(*p*) (1857), 1 H. & N. 195; 26 L. J. Ex. 41.

(*q*) Benjamin on Sale, p. 184 (4th ed.).

(*r*) Elmore *v.* Kingscote (1826), 5 B. & C. 583; 8 D. & R. 343; Goodman *v.* Griffiths (1857), 1 H. & N. 574; 26 L. J. Ex. 145; Acebal *v.* Levy (1834), 10 Bing. 376; 4 M. & S. 217.

(*s*) See Boydell *v.* Drummond, *supra;* Fitzmaurice *v.* Bayley (1857), 9 H. L. C. 78; 26 L. J. Q. B. 114; Holmes *v.* Mitchell (1859), 7 C. B. 361; 28 L. J. C. P. 201.

(*t*) R. S. C. Order 19, rr. 15, 20.

(*u*) Brunning *v.* Odhams (1896), 75 L. T. 602.

(*x*) (1701), Colles' P. C. 108; and see the notes to this case in White and Tudor's Leading Cases in Equity, vol. 2, p. 460 (7th ed.).

(*y*) Dale *v.* Hamilton (1846), 2 Phil. 266; 5 Hare, 369; considered in De Nicols *v.* Curlier (No. 2), [1900] 2 Ch. 410; 69 L. J. Ch. 680. And see Surcome *v.* Pinniger (1853), 3 D. M. & G. 571; 22 L. J. Ch. 419.

(*z*) Mundy *v.* Jolliffe (1839), 5 Myl. & Cr. 167; 9 L. J. Ch. 95; Crowley *v.* O'Sullivan, [1900] 2 Ir. R. 478.

Maddison v. Alderson.

decreed (*a*). The interesting case of Maddison *v.* Alderson (*b*) may be referred to on this subject. A woman had been induced by an old Yorkshire farmer to serve him as housekeeper without any wages for a number of years on the faith of his verbal promise to make a will leaving her a life estate in the farm. It was held that the continuance in the farmer's service in reliance on this promise was no answer to the 4th section of the Statute of Frauds, because it was not unequivocally and in its own nature referable to the contract.

Miller & Aldworth, Ltd. *v.* Sharp.

On the other hand, the recent case of Miller & Aldworth, Ltd. *v.* Sharp (*c*) should be consulted. A landlord having verbally agreed with his yearly tenants to grant them a lease for twenty-one years of the messuage held by them (without the inclusion in the lease of any additional property) at an increased rent, the tenants for some time afterwards paid the increased rent. It was held, that, notwithstanding anything laid down in Maddison *v.* Alderson, the payment of rent was a sufficient part performance to take the case out of the Statute of Frauds; and that parol evidence of the agreement was therefore admissible.

Interests in or concerning Land.

[31]

CROSBY *v.* WADSWORTH. (1805)

[6 East, 602; 5 Smith, 559.]

Farmer Wadsworth had a field of grass, which Crosby, with an eye to hay, desired to purchase. Meeting casually one day in June, it was agreed between them in conversation that Crosby should have the grass for 20 guineas, only

(*a*) Thynne *v.* Glengall (1848), 2 H. L. C. 131; Williams *v.* Evans (1875), L. R. 19 Eq. 547; 32 L. T. 360.

(*b*) (1883), 8 App. Cas. 467; 52 L. J. Q. B. 737. See also May *v.* Thomson (1882), 20 Ch. D. 705; 51 L. J. Ch 917; Britain *v.* Rossiter (1879), 11 Q. B. D. 123; 48 L. J. Ex. 362; Humphreys *v.* Green (1882), 10 Q. B. D. 148; 52 L. J. Q. B. 140; and M'Manus *v.* Cooke (1887), 35 Ch. D. 681; 56 L. J. Ch. 662.

(*c*) [1899] 1 Ch. 622; 68 L. J. Ch. 322. See also Nunn *v.* Fabian (1865), L. R. 1 Ch. 35; 35 L. J. Ch. 110; and Humphreys *v.* Green *supra*.

he was to have the trouble of mowing and making it into hay. Soon afterwards, however, Wadsworth got a better offer for his grass, so he coolly proceeded to break his word to Crosby. The latter brought this action for breach of contract, but unfortunately took nothing by that, as it was held that *the contract was one which had to do with the land, and therefore should have been in writing*, as required by the 4th section of the Statute of Frauds.

Growing potatoes.

The case that is often contrasted with Crosby *v.* Wadsworth is Parker *v.* Staniland (*d*), where it was held that a contract for the sale of *growing potatoes* was *not* a contract for the sale of any interest in or concerning land, the potatoes being regarded as chattels stored in a warehouse.

Difficulty of laying down clear rule.

It is not easy to extract from the cases a clear rule for determining when, and when not, a sale of growing crops is a sale of an "interest in or concerning" lands. In Benjamin's "Sale of Personal Property," however, the law is summarised as follows (*e*):—

Mr. Benjamin's rule.

"Growing crops, if FRUCTUS INDUSTRIALES, are chattels, and an agreement for the sale of them, whether mature or immature, whether the property in them is transferred before or after severance, is not an agreement for the sale of any interest in land, and is not governed by the 4th section of the Statute of Frauds. Growing crops, if FRUCTUS NATURALES, are part of the soil *before severance*, and an agreement, therefore, vesting an interest in them in the purchaser before severance, is governed by the 4th section; but if the interest is not to be vested till they are converted into chattels by severance, then the agreement is an executory agreement for the sale of goods, wares, and merchandise, governed by the 17th and not by the 4th section of the statute."

For cases in support of this proposition reference should be made (in addition to the leading case and to Parker *v.* Staniland) to Smith *v.* Surman (*f*) (standing timber to be cut by the seller—held *not* within sect. 4); Warwick *v.* Bruce (*g*), and Sainsbury *v.* Matthews (*h*) (potatoes to be dug by the purchaser when ripe—held *not* within sect. 4); Washburn *v.* Burrows (*i*) (growing grass to be cut by the

(*d*) (1809), 11 East, 362; 10 R. R. 521.
(*e*) P. 121 (4th ed.).
(*f*) (1829), 9 B. & C. 561; 4 M. & R. 455.
(*g*) (1813), 2 M. & S. 205; 6 Taunt. 118.
(*h*) (1838), 4 M. & W. 343.
(*i*) (1847), 1 Ex. 107.

seller—held *not* within sect. 4); Evans *v.* Roberts (*k*) (potatoes to be turned up by the seller—held *not* within sect. 4); Rodwell *v.* Phillips (*l*) (growing fruit—held *within* sect. 4); and Marshall *v.* Green (*m*) (growing timber to be cut by the purchaser—held *not* within sect. 4).

Sale of Goods Act, 1893.

The extent to which, if at all, the law as above stated has been altered by the Sale of Goods Act, 1893 (*n*), is difficult to determine. Sect. 62 (1) defines "goods" as including "all chattels personal other than things in action and money . . . . . *emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale, or under the contract of sale.*"

It is noticeable that the Act does not say *who* is to sever, or *when* the severance is to take place, but lays stress only on the part of the *agreement* as to severance pursuant to the contract. For a full discussion of the probable effect of this section, reference should be made to "A Commentary on the Sale of Goods Act, 1893," by Ker and Pearson-Gee, pp. 23—27.

Agreements required to be in writing.

As to things other than growing crops, the following agreements have been held to "concern" land and require writing:—

To enable a person to take *water from a well* (*o*);

To convey an *equity of redemption* (*p*);

To let or take *furnished lodgings* (*q*), or a *furnished flat* (*r*);

To let *machinery affixed to a building* (*s*);

To sell a house as building material, to be removed by the *buyer* within two months (*t*);

To *surrender a tenancy*, and try and get the landlord to accept the other contracting party as tenant (*u*);

To sell *shares in a mine* (*x*); and

To sell *debentures in a company* that create a "floating charge" on its property consisting in part of leaseholds (*y*);

An *agreement for a lease*, or for the sale, assignment, or transfer of a leasehold estate (*z*); and

(*k*) (1826), 5 B. & C. 829; 8 D. & R. 611.

(*l*) (1842), 9 M. & W. 502; 11 L. J. Ex. 217.

(*m*) (1875), 1 C. P. D. 35; 45 L. J. C. P. 153; distinguished in Lavery *v.* Pursell (1888), 39 Ch. D. 508; 57 L. J. Ch. 570.

(*n*) 56 & 57 Vict. c. 71.

(*o*) Tyler *v.* Bennett (1836), 5 Ad. & E. 377.

(*p*) Massey *v.* Johnson (1847), 1 Ex. 255; 17 L. J. Ex. 182.

(*q*) Inman *v.* Stamp (1815), 1 Stark. 12; 18 R. R. 740.

(*r*) Thursby *v.* Eccles (1901), 70 L. J. Q. B. 91; 49 W. R. 281.

(*s*) Jarvis *v.* Jarvis (1894), 63 L. J. Ch. 10; 69 L. T. 412.

(*t*) Lavery *v.* Pursell, *supra.*

(*u*) Cocking *v.* Ward (1845), 15 L. J. C. P. 245; 1 C. B. 858.

(*x*) Boyce *v.* Green (1826), Batty, 608.

(*y*) Driver *v.* Broad, [1893] 1 Q. B. 744; 63 L. J. Q. B. 12.

(*z*) Poulteney *v.* Holmes (1721), Str. 405.

A grant of a *right to shoot* over land, and take away a part of the game killed (*a*).

But the following agreements have been held *not* to be within sect. 4 :— Agreements which need not be in writing.

To build a *water-closet* for a tenant (*b*);

For *board and lodging* merely (*c*);

As to the cost of *investigating the title* to land (*d*);

To give a person *the first refusal* of lands (*e*);

To sell *shares* in railway, canal, dock, banking, insurance, or gas companies (*f*);

To sell trees which have been blown down and so severed from the soil (*g*);

Although a partnership in land may be proved by parol evidence, yet an agreement by one of the partners to retire and to assign his share in the partnership assets is (as was held in Gray *v.* Smith (*h*)) an agreement to assign an interest in land and must be evidenced by a sufficient memorandum in writing; Partnership.

And in the equity leading case of Russell *v.* Russell (*i*) it was held that an equitable mortgage by *deposit of title-deeds* was valid, notwithstanding the 4th section of the Statute of Frauds, on the ground that it was not a contract *to be* performed, but was one already executed. Deposit of title deeds.

Not to be performed within the space of One Year.

PETER *v.* COMPTON. (1694) [32]

[Skin. 353.]

"Peter, my boy," said Compton, festively, "what do you say to this? *If you will give me a guinea now, I will give*

(*a*) Webber *v.* Lee (1882), 9 Q. B. D. 315; 51 L. J. Q. B. 485.

(*b*) Mann *v.* Nunn (1874), 43 L. J. C. P. 241; 30 L. T. 526.

(*c*) Wright *v.* Stavert (1860), 2 E. & E. 721; 29 L. J. Q. B. 161.

(*d*) Jeakes *v.* White (1851), 6 Ex. 873; 21 L. J. Ex. 265.

(*e*) Manchester Ship Canal Co. *v.* Manchester Racecourse Co., [1901] 2 Ch. 37; 70 L. J. Ch. 468.

(*f*) Bligh *v.* Brent (1837), 2 Y. & C. 268; 6 L. J. (N. S.) Ex. 58; Bradley *v.* Holdsworth (1838), 3 M. & W. 422; 1 H. & H. 156; and Duncuft *v.* Albrecht (1841), 12 Sim. 189; 56 R. R. 46.

(*g*) *In re* Ainslie (1885), 30 Ch. D. 485; 55 L. J. Ch. 615.

(*h*) (1889), 43 Ch. D. 208; 59 L. J. Ch. 145.

(*i*) (1783), 1 Bro. C. C. 269.

you 1000 *guineas on your wedding day.*" "Agreed," cried Peter, and paid down the guinea.

Two years afterwards Peter married, and claimed the 1000 guineas. Compton declined to pay, because, he said, the 4th section of the Statute of Frauds provided that an "agreement that is not to be performed within the space of one year from the making thereof" must be in writing.

It was held, however, that *the statute only applies to agreements which are in their terms incapable of performance* within the year, whereas Peter might have got married the very next day.

Agreements incapable of performance within the year.

A contract of service for a term of more than a year is within the statute (*k*); but a contract to serve for one year, the service to commence on the day next after that on which the contract is made, is not a contract which is not to be performed within a year within the meaning of the statute (*l*). A general hiring, however, which is construed to be for a year, need not be in writing (*m*).

Condition which may put an end to agreement within year.

Supposing the agreement to be *in its terms* incapable of performance within the year, it must still be in writing, though there is a condition which may put an end to it within the year. Thus, a contract with a coachmaker to hire a carriage from him for five years has been held unenforceable because not in writing, although it was part of the agreement that either party might put an end to it at a moment's notice (*n*). On the same principle, a contract between a solicitor and an insurance company that the former shall be the company's solicitor *during his whole professional life and so long as they continue a company*, must be in writing, notwithstanding the chance of its terminating by death, resignation, or otherwise (*o*).

On the other hand, a promise by a man to a woman he had

(*k*) Giraud *v.* Richmond (1845), 15 L. J. C. P. 180; 2 C. B. 835.

(*l*) Smith *v.* Gold Coast and Ashanti Explorers, Ld., [1903] 1 K. B. 285, 538; 72 L. J. K. B. 235; approving *dicta* in Cawthorne *v.* Cordrey (1863), 13 C. B. N. S. 406; and Britain *v.* Rossiter (1879), 11 Q. B. D. 123; 48 L. J. Ex. 362; and Bracegirdle *v.* Heald (1818), 1 B. & Ald. 722; 19 R. R. 442. But see Dollar *v.* Parkington (1901), 84 L. T. 470.

(*m*) Beeston *v.* Collyer (1827), 4 Bing. 309; 2 C. & P. 607.

(*n*) Birch *v.* Liverpool (1829), 9 B. & C. 392; 4 M. & Ry. 380.

(*o*) Eley *v.* Positive Assurance Co. (1875), 1 Ex. Div. 20, 88; 45 L. J. Ex. 58.

cohabited with to pay her £300 a year *so long as she should maintain and educate their seven illegitimate children*, has been held *not* within the statute (*p*).

So has a contract for valuable consideration to leave a sum o money whenever the promisor should die (*q*).

The question in all these cases is, Is the contract *primâ facie* incapable of performance within the year?

Donellan *v.* Read.

The section applies only to contracts which are not to be performed *on either side* within the year; so that Peter *v.* Compton might have been decided in the same way on the ground that one of the parties was wholly to execute his part of the contract within the year. The leading case on this point is Donellan *v.* Read (*r*), an action for extra rent payable in pursuance of the terms of a verbal agreement by which the landlord was forthwith to do some repairs.

See also Bevan *v.* Carr (1885), 1 C. & E. 499; Miles *v.* New Zealand Alford Estate Co. (1886), 32 Ch. D. 266; 54 L. J. Ch. 1035; and Johnstone *v.* Mappin (1891), 60 L. J. Ch. 241; 64 L. T. 48: where, before the marriage of A. and B., B.'s father verbally promised to pay his daughter £300 a year, and, in consequence of that promise, A. and B. married; and, upon the father's refusal to pay this sum, it was held that the marriage was *not* a part performance of such a parol agreement, and that as the promise was not in writing it could not be enforced.

Sale of Goods of the Value of Ten Pounds.

BALDEY *v.* PARKER. (1823) [33]

[2 B. & C. 37; 3 D. & R. 220.]

Mr. Parker went into a linendraper's shop, and bargained for a number of trifling articles, a separate price being agreed on for each, and no one article being priced

(*p*) Knowlman *v.* Bluett (1874), L. R. 9 Ex. 1, 307; 43 L. J. Ex. 151; and see McGregor *v.* McGregor (1888), 21 Q. B. D. 424; 57 L. J. Q. B. 591; and Hammond *v.* Meadows (1889), W. N. 108.

(*q*) Ridley *v.* Ridley (1865), 34 L. J. Ch. 462; 34 Beav. 478.

(*r*) (1832), 3 B. & Ad. 899; 1 L. J. K. B. 269. See Smith's L. C. vol. 1, p. 319 (11th ed.), where this decision is criticised.

so high as £10. The articles that Mr. Parker decided to buy he marked with a pencil, or assisted in cutting from a larger bulk. Then he went home, desiring that an account of the whole should be sent after him. This was done, and the sum Parker was asked to pay was £70, *minus* 5 per cent. discount for ready money. This discount he quarrelled with, not considering it liberal enough, and, when the goods were sent to him, he refused to accept them.

This was an action by the linendraper against his recalcitrant customer, and the main question was whether the contract was one "for the sale of goods, wares, or merchandises for the price of £10" within the 17th section of the Statute of Frauds. The question was decided in the affirmative, the contract having been an entire one, and "it being the intention of that statute," as Holroyd, J., said, "that, where the contract, *either at the commencement or at the conclusion*, amounted to, or exceeded the value of £10, it should not bind unless the requisites there mentioned were complied with." "The danger," he added, "of false testimony is quite as great where the bargain is ultimately of the value of £10 as if it had been originally of that amount."

Contract of sale for ten pounds and upwards.

Section 4 (1) of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), provides that: "A contract for the sale of any goods of the value of ten pounds or upwards shall not be enforceable by action unless the buyer shall accept part of the goods so sold, and actually receive the same, or give something in earnest to bind the contract, or in part payment, or unless some note or memorandum in writing of the contract be made and signed by the party to be charged or his agent in that behalf." This section reproduces, in a slightly amended form, sect. 17 of the Statute of Frauds (29 Car. 2, c. 3) (which is repealed by sect. 60, as is also sect. 7 of Lord Tenterden's Act (9 Geo. 4, c. 14)); consequently, the existing case law on the subject still applies.

What are "goods."

It should be observed that the word "goods" is substituted, in the 4th section of the Sale of Goods Act, for "goods, wares, and

merchandises" in the 17th section of the Statute of Frauds; and "goods" are, in sect. 62 of the 1893 Act, defined as "all chattels personal other than things in action and money, and includes emblements, industrial growing crops, and things attached to or forming part of the land which are agreed to be severed before sale or under the contract of sale." This definition of the word "goods" seems to include all corporeal moveable property, but does not include incorporeal rights or property, such as (1) scrip (*s*), shares (*t*), and stocks (*u*); (2) documents of title (*x*); (3) tenants' fixtures sold as unsevered (*y*). And on this point see the notes to Crosby *v.* Wadsworth, *ante*, p. 128.

"Value."

Again, the word "value" is substituted, in sect. 4 of the Sale of Goods Act, for the word "price" in the 17th section of the Statute of Frauds, though sect. 7 of Lord Tenterden's Act had already effected this change (*z*). The result of this change is to set at rest the doubts (previously expressed in many conflicting decisions) whether the Statute of Frauds applied to executory agreements as well as to bargains and sales.

With regard to the distinction between contracts of sale and contracts for work and materials or for the affixing of a chattel, see the notes to Lee *v.* Griffin, *post*, p. 144.

Principle of leading case.

The principle of the leading case still applies, and consequently, where there is an entire contract for the sale of different goods (whether all are in existence or not), the aggregate value of which amounts to £10 or upwards, such contract is within sect. 4 of the Sale of Goods Act. A good illustration of this rule is to be found in the case of Scott *v.* Eastern Counties Rail. Co. (*a*). There the defendants ordered of the plaintiff some ready-made lamps, and an additional one to be manufactured; the defendants accepted and paid for the ready-made lamps, but refused the other. The value of the lamps was over £10. It was held that the defendants' acceptance of the ready-made lamps made the contract, *being entire*, enforceable as regards the other. "Can it be said," observed Lord Abinger, "that if a man goes to a tailor's shop and buys a

Scott *v.* Eastern Counties Ry. Co.

(*s*) Knight *v.* Barber (1846), 16 M. & W. 66; 16 L. J. Ex. 18.

(*t*) Humble *v.* Mitchell (1839), 11 A. & E. 205; 3 P. & D. 141; Duncuft *v.* Albrecht (1841), 12 Sim. 189; 56 R. R. 46; Bradley *v.* Holdsworth (1838), 3 M. & W. 422; 1 H. & H. 156; Colonial Bank *v.* Whinney (1885), 30 Ch. D. 261; 55 L. J. Ch. 585.

(*u*) Heseltine *v.* Siggers (1848), 1 Ex. 856; 18 L. J. Ex. 166.

(*x*) Freeman *v.* Appleyard (1862), 32 L. J. Ex. 175 (goods within Factors Act).

(*y*) Lee *v.* Gaskell (1876), 1 Q. B. D. 700; 45 L. J. Q. B. 540.

(*z*) Harman *v.* Reeve (1855), 18 C. B. 587; 25 L. J. C. P. 257.

(*a*) (1843), 12 M. & W. 33; 13 L. J. Ex. 14.

suit of clothes which are ready made, and at the same time orders another suit to be made for him, he is not bound to pay for the latter? . . . . It is plain that where an order for goods made, and for others to be made, forms an entire contract, acceptance of the former goods will take the case out of the statutes (*b*) as regards the latter also."

Lots at auction.

Where, however, at an auction several successive lots are knocked down to the same person, a distinct contract arises as to each lot (*c*).

Future crop.

And it has been held that, although *at the time of the contract it is uncertain* whether the subject-matter of the sale will be worth £10 or not (*e.g.*, suppose the sale to be of a future crop of turnip-seed, which may or may not turn out a success), yet if that figure is ultimately reached, the statute applies (*d*).

Another difference between the 17th section of the Statute of Frauds and the 4th section of the Sale of Goods Act should be observed; namely, that the words "shall not be enforceable by action" in the latter, are substituted for the words "shall not be allowed to be good" in the former. A distinction had been drawn in the case of Leroux *v.* Brown (*e*), between the phraseology of the 4th and 17th sections of the Statute of Frauds, and it was decided that the former dealt only with *procedure*, and not with the validity of the contract itself. "It is settled by the cases of Laythoarp *v.* Bryant (*f*) and Leroux *v.* Brown" (*g*), said Smith, L. J., in the case of *In re* Hoyle (*h*), "that the section (the 4th) does not apply to the contract itself, but to the evidence of the contract." And as the terms of sect. 4 of the Sale of Goods Act are similar in this respect to those of sect. 4 of the Statute of Frauds, it is apprehended that the principle of Leroux *v.* Brown will apply, so far as the facts allow, to cases under the former. Thus it is submitted, (1) that the seller, having several debts against the buyer, may appropriate moneys paid him, by the buyer without appropriation, to his debt under an unenforceable contract of sale (*i*); (2) that

(*b*) *I.e.*, Statute of Frauds and Lord Tenterden's Act (which must be construed as incorporated together).

(*c*) Sect. 58 (1) of 56 & 57 Vict. c. 71; Emmerson *v.* Heelis (1809), 2 Taunt. 38; 11 R. R. 520; and see Rugg *v.* Minett (1809), 11 East, 210; 10 R. R. 475.

(*d*) Watts *v.* Friend (1830), 10 B. & C. 446; 8 L. J. K. B. 181.

(*e*) (1836), 12 C. B. 801; 22 L. J. C. P. 1.

(*f*) (1836), 2 Bing. N. C. 735; 3 Scott, 238.

(*g*) *Supra.*

(*h*) [1893] 1 Ch. 84, 100; 62 L. J. Ch. 182.

(*i*) See the analogy of the Tippling Act; Philpott *v.* Jones (1834), 2 A. & E. 41; 4 N. & M. 14; Cruikshanks *v.* Rose (1831), 1 Moo. & R. 100; 5 C. & P. 19.

the seller could recover against the buyer on an *account stated* (*k*); and (3) that the execution of an unenforceable contract would be good by way of accord and satisfaction (*l*). And further, it is suggested that the *remedy*, either direct or indirect, by *action only* having been taken away, it follows that (1) no remedy other than by action is affected; (2) anything done in pursuance of such a contract may be the foundation of a new liability in a distinct contract or obligation *quasi ex contractu*; and (3) the contract may be looked at for the purpose of explaining anything done under it (*m*).

In the leading case an attempt was made to bring the purchaser within the other part of the 17th section by showing that he had "accepted and actually received" the goods. The continuance of the vendor's lien, however, was held to be fatal to such a contention (*n*).

Accept and actually Receive.

ELMORE *v.* STONE. (1809) [34]

[1 Taunt. 458; 10 R. R. 578.]

Elmore was a livery stable-keeper, and had a couple of horses for sale, for which he wanted £200. Stone sent word he would take the horses, "but, as he had neither servant nor stable, Mr. Elmore must keep them at livery for him."

In consequence of this message, Elmore removed the horses from his sale stable into another stable, which he called his livery stable. In an action which he brought for the price, the question was whether such removal was

(*k*) Cocking *v.* Ward (1845), 1 C. B. 858; 66 L. T. 616.

(*l*) Lavery *v.* Turley (1860), 6 H. & N. 239; 30 L. J. Ex. 49; and see Ker and Pearson-Gee on the Sale of Goods Act, p. 28.

(*m*) See Pollock on Contracts, p. 649 (7th ed.).

(*n*) See *post*, p. 142.

a sufficient constructive delivery to take the case out of the Statute of Frauds, and it was held that it was, as Elmore *from that time held the horses, not as owner, but as any other livery stable-keeper might have done.*

TEMPEST *v.* FITZGERALD. (1820)

[35] [3 B. & Ald. 680; 22 R. R. 526.]

Mr. Fitzgerald, paying a visit to Mr. Tempest, took a fancy to one of his host's horses, and finally agreed to buy it for 45 guineas. He could not do with the animal just then, but he said he would call for it on his way to Doncaster races, and Tempest agreed to take care of it in the meantime. Both parties understood the transaction to be a ready-money bargain. Just before the races Fitzgerald returned to Tempest's house, galloped the horse, and gave various directions about it, treated it in every way as his own, and asked his host to keep it a week longer, saying he would return immediately after the races, pay the 45 guineas, and take the horse away. Unfortunately, during the Doncaster race-week, the horse died, and mutual recriminations ensued; Tempest contending that the loss ought to fall on Fitzgerald, as the property in the horse had passed to him, Fitzgerald maintaining the opposite view. The latter was the view adopted by the judges, as they considered there had been no such receipt as would satisfy the Statute of Frauds.

Acceptance and receipt.

While the 4th section of the Sale of Goods Act inculcates on contracting parties the importance and desirability of writing, when the value of the goods sold amounts to £10 or upwards, it at the same time permits them, in the absence of writing, to bind themselves if certain other circumstances are present. Writing, for instance, is unnecessary if "the buyer shall *accept* part of the goods

so sold, *and actually receive* the same." This section (which re-enacts the 17th section of the Statute of Frauds) also provides that "*there is an acceptance of goods within the meaning of this section when the buyer does any act in relation to the goods which recognises a pre-existing contract of sale, whether there be an acceptance in performance of the contract or not.*" Sale of Goods Act, 1893, s. 4, sub-s. (3).

Although, however, the word "acceptance" as used in the 4th section of the Sale of Goods Act is defined in sub-sect. (3), still, this definition itself requires some explanation. It is probably correct to state that there can now be no "acceptance" within the meaning of this section, unless the buyer has done some act in relation to the goods which *necessarily* recognises a pre-existing contract of sale. Now, an act which recognises a pre-existing contract of sale was defined in the cases of Page *v.* Morgan (*o*) and Kibble *v.* Gough (*p*), as one "which could not have been done except upon admission that there was a contract, and that the goods were sent to fulfil that contract"; as "such a dealing with the goods as amounts to a recognition of the contract" (*q*); "a dealing with the goods involving an admission that there was a contract" (*r*). And Brett, M. R., in Page *v.* Morgan (*s*), further shows, negatively, the extent of the operation of such an act in the following words:—"Suppose that, the goods being taken into the defendant's warehouse by the defendant's servants, directly he sees them, instead of examining them, he orders them to be turned out, or refuses to have anything to do with them. There would be an actual delivery, but there would be no acceptance of the goods, *for it would be quite consistent with what was done that he entirely repudiated any contract for the purchase of the same.*" Reference should be made to two recent cases on this point, the one decided just prior to the Sale of Goods Act, and the other decided subsequently to the Act. In the case of Taylor *v.* Smith (*t*) (decided in 1892), the defendant, who carried on business at Manchester, orally agreed to purchase from the plaintiffs, timber merchants at Liverpool, a quantity of spruce deals, to be forwarded to Manchester by a carrier nominated by the defendants. An invoice of the goods was sent by the plaintiffs to the defendant, and the carrier also sent an advice note to inform him of the arrival of the goods at Manchester. This note specified the number of the

Meaning of "acceptance."

Page *v.* Morgan.

Taylor *v.* Smith.

(*o*) (1885), 15 Q. B. D. 228; 54 L. J. Q. B. 434.

(*p*) (1878), 38 L. T. N. S. 204.

(*q*) Per Bowen, L. J., in Page *v.* Morgan, *supra*, at p. 233.

(*r*) Per Brett, M. R., in Page *v.* Morgan, *supra*, at p. 232.

(*s*) *Ibid.*

(*t*) [1893] 2 Q. B. 65; 61 L. J. Q. B. 331. But see König *v.* Brandt, *infra*.

deals, and stated them to be consigned by the plaintiffs, but did not state their price, nor refer to the invoice or any other document. On October 28th, the day of the arrival of the goods, and also on the following day, the defendant inspected them, and subsequently wrote and signed the following memorandum on the advice note: "Rejected. Not according to representation." On November 8th, he wrote to the plaintiffs, rejecting the goods as not being "according to representation." Upon these facts, the Court of Appeal held, that there had been no such dealing with the goods by the defendant as to constitute an "acceptance" of them by him within the 17th section of the Statute of Frauds. "I cannot think," said Lord Herschell, "that the *mere inspection* of the goods by the defendant amounted to acceptance, even accompanied with such delay as there was in communicating with the vendors. No doubt you might have a case in which there was such an amount of delay after the goods had been placed in the custody directed by the purchaser as to prevent the purchaser from withdrawing, but here there has been no such lapse of time as can preclude the purchaser from denying that he has accepted the goods." It is difficult, however, to see how an examination of goods on two occasions, coupled with a statement that they were not "according to representation," and a rejection, was not an "act in relation to" the goods recognising a contract of sale within sub-sect. (3) of sect. 4 of the Sale of Goods Act. A safer guide to the present law on this subject is probably the later case of Abbott *v.* Wolsey (*u*).

Abbott *v.* Wolsey.

The action was brought to recover damages for non-acceptance of hay alleged to have been sold by the plaintiff to the defendant. The material facts were as follows:—The plaintiff on July 13th, 1894, sold to the defendant twenty tons of Dutch hay, to be delivered at defendant's wharf at Nine Elms, "barge to be alongside on or before July 21st, 1894, or order cancelled." There was no memorandum in writing of the contract signed by the defendant, or an agent on his behalf. The barge was not alongside the defendant's wharf by July 21st, and, on August 4th, the plaintiff sent a messenger to the defendant to ask whether he would then accept the hay. The defendant then said that he would take the hay if the barge was alongside his wharf by August 8th. The barge was alongside on that day, and the plaintiff's lighterman handed to a servant of the defendant a receiving note for the hay,

(*u*) [1895] 2 Q. B. 97; 64 L. J. Q. B. 587. A good selection of cases on "acceptance," with their salient facts, in chronological order, is given on pp. 35 and 36 of Ker and Pearson-Gee's book on the Sale of Goods Act.

which was not returned. The defendant came on board the barge, took a sample of the hay, and, after examining it, said, "The hay is not to my sample, and I shall not have it." The Court of Appeal held, upon these facts, that there was evidence of an act done by the buyer in relation to the goods which recognised a pre-existing contract of sale, and therefore evidence of an acceptance within the meaning of sect. 4 of the Sale of Goods Act. "*It may be*," said Lord Esher, M. R., "*that mere inspection would not amount to an act which recognises a pre-existing contract; but, if the defendant does an act, and uses words with regard to that act, those words are material as explaining the act and showing the nature of it.* Here the defendant took what is known in business as a sample. He not only took that sample, but he said that it was not equal to his sample; by which he must have meant some sample previously given to him in connection with a contract for the sale of hay. He did not take the sample merely in order to inspect the quality of the hay, but to see whether it was equal in quality to another sample. I think that that act of taking a sample as explained by the words which accompanied it was an act which recognised a pre-existing contract." And where, after receiving the goods, the buyer tries to resell them, using for the purpose a sample obtained from the sellers, and keeps the goods for a month, there is an acceptance by him of the goods within the meaning of the statute, although he does not inspect the goods or take a sample from the bulk (*x*). König *v.* Brandt.

The words of the statute have been so interpreted that they are satisfied very often by a *constructive acceptance*. In Elmore *v.* Stone, for instance, the seller changes his character, and becomes a bailee for the purchaser. Similarly, if a man sold his horse, but asked the purchaser if he would be kind enough to let him keep it a few days longer, and the purchaser consented, there would be a sufficient acceptance (*y*). So there was held to be evidence of acceptance in a case where the defendant, having verbally agreed to buy a haystack of the plaintiff's, resold part of it to a third person, who removed it (*z*). Constructive acceptance.

"It is of great consequence," said Lord Kenyon, C. J., in that

(*x*) See König *v.* Brandt (1901), 84 L. T. 748; 9 Asp. M. C. 199; where Taylor *v.* Smith (*supra*) is discussed and declared to be of no general application, and to lay down no principle of law.

(*y*) Marvin *v.* Wallis (1856), 6 E. & B. 726; 25 L. J. Q. B. 369; Castle *v.* Sworder (1861), 6 H. & N. 828; 30 L. J. Ex. 310; Beaumont *v.* Brengeri (1847), 5 C. B. 301; but see Carter *v.* Toussaint (1822), 5 B. & Al. 855; 1 D. & R. 515.

(*z*) Chaplin *v.* Rogers (1800), 1 East, 192; 6 R. R. 249; Parker *v.* Wallis (1855), 5 E. & B. 21; Bill *v.* Bament (1841), 9 M. & W. 36; 11 L. J. Ex. 81.

case, "to preserve unimpaired the several provisions of the Statute of Frauds, *which is one of the wisest laws in our statute book*. I do not mean to disturb the settled construction of the statute, that, in order to take a contract for the sale of goods of this value out of it, there must either be a part delivery of the thing, or a part payment of the consideration, or the agreement must be reduced to writing in the manner therein specified. But I am not satisfied in this case that the jury have not done rightly in finding the fact of a delivery. *Where goods are ponderous, and incapable (as here) of being handed over from one to another, there need not be an actual delivery; but it may be done by that which is tantamount, such as the delivery of the key of a warehouse in which the goods are lodged, or by delivery of other indicia of property.*" A carrier is not an agent to *accept* goods (*a*).

Carrier.

An acceptance may precede, be contemporaneous with, or subsequent to, an actual receipt (*b*). It must, however, take place with the consent of the seller. Accordingly, an acceptance subsequent to the seller's disaffirmance of the, as yet, unenforceable contract is unavailing (*c*). Acceptance of a sample is sufficient, if it is taken as part of the bulk (*d*).

Effect of acceptance.

The effect of the "acceptance" required by sect. 4 of the Sale of Goods Act is not to preclude a party from disputing that the contract has been properly carried out, but simply to prevent him from objecting that the contract is not in writing (*e*). And it must be observed that the term "acceptance" is used in two senses in the Act—that in sect. 4, as explained above, and that in sect. 35, which is an acceptance in the *performance of the contract* (*f*).

Actual receipt.

The 4th section of the Sale of Goods Act, 1893, does not give any definition of *actual receipt*.

An "actual receipt" may be said *generally* to take place when there is a delivery of the goods, or of the documents of title thereto, to or into the control of the buyer, *so as to divest the seller's lien* in respect thereof. There is, however, one important exception to this rule, namely, in the case where the seller becomes bailee for the buyer; for this is sufficient to constitute an "actual receipt," though it does not divest the seller's lien (*g*).

(*a*) Hanson *v.* Armitage (1822), 5 B. & A. 557; 1 D. & R. 128.

(*b*) Cusack *v.* Robinson (1861), 1 B. & S. 299; 30 L. J. Q. B. 261.

(*c*) Taylor *v.* Wakefield (1856), 6 E. & B. 765; 2 Jur. N. S. 1086; Smith *v.* Hudson (1865), 6 B. & S. 431; 34 L. J. Q. B. 145.

(*d*) Hinde *v.* Whitehouse (1806), 7 East, 558; 3 Smith, 528; Gardner *v.* Grout (1857), 2 C. B. N. S. 340.

(*e*) Morton *v.* Tibbett (1850), 15 Q. B. 428; 19 L. J. Q. B. 382; and Grimoldby *v.* Wells (1875), L. R. 10 C. P. 391; 44 L. J. C. P. 203.

(*f*) See the judgments in Abbott *v.* Wolsey, *supra*.

(*g*) See sect. 41, sub-sect. (2), of the Sale of Goods Act, 1893, which

Goods in buyer's possession.

If the goods are already in the buyer's possession, an actual receipt is proved by showing that he has done acts inconsistent with the supposition that his former possession has remained unchanged. These acts may be proved by parol, and it is a question of fact for the jury whether the acts were done because the buyer had taken to the goods as owner (*h*).

Goods in possession of third person.

Where the goods are in possession of a third person as bailee for the seller, an "actual receipt" takes place when the seller, the buyer, and the third person agree together that the latter shall cease to hold the goods for the seller, and shall hold them for the buyer. It is important to observe that all the parties must join in this agreement, for the agent of the seller cannot be converted into an agent for the buyer without his knowledge and consent (*i*).

Delivery to carrier.

It is well settled that the delivery of goods to a common carrier, *a fortiori*, to one specially designated by the buyer, for conveyance to him, or to a place designated by him, constitutes an *actual receipt* by the buyer. In such cases the carrier is, in contemplation of law, the bailee of the person *to* whom, not *by* whom, the goods are sent, the latter, in employing the carrier, being considered as an agent of the former for that purpose (*k*).

It is important to remark that the carrier only represents the buyer for the purpose of *receiving*, not *accepting*, the goods (*l*).

Earnest and part payment.

Writing is also unnecessary if the buyer gives "something in *earnest* to bind the bargain or *in part payment*." If what the buyer gives is money, it presumably forms part of the price; otherwise it is in the nature of a pledge. There must be an *actual transference*. Therefore it is not sufficient for the buyer to draw a shilling across the hand of the seller, and then put it into his pocket again (*m*). Nor will the buyer's relinquishment of a debt do (*n*).

extends the previous law as laid down in Townley *v.* Crump (1836), 4 A. & E. 58; 5 N. & M. 606; and Grice *v.* Richardson (1877), 3 App. Cas. 319; 47 L. J. P. C. 48; following Miles *v.* Gorton (1834), 2 C. & M. 504; 3 L. J. (N. S.) Ex. 155; which was limited to cases where the buyer was insolvent.

(*h*) See Edan *v.* Dudfield (1841), 1 Q. B. 302; 4 P. & D. 656; Benjamin on Sale, p. 160 (4th ed.).

(*i*) Farina *v.* Home (1846), 16 M. & W. 119; 16 L. J. Ex. 73; and per Crompton, J., in Castle *v.* Sworder (1861), 30 L. J. Ex. 316; 6 H. & N. 828; Benjamin on Sale, p. 161 (4th ed.).

(*k*) See sect. 32 of the Sale of Goods Act, 1893; and Dawes *v.* Peck (1799), 8 T. R. 330; 3 Esp. 12; Dunlop *v.* Lambert (1839), 6 Cl. & Fin. 600; 49 R. R. 143; Wait *v.* Baker (1848), 2 Ex. 1; 17 L. J. Ex. 307; Benjamin on Sale, p. 169 (4th ed.).

(*l*) Hanson *v.* Armitage, *supra*.

(*m*) Blenkinsop *v.* Clayton (1817), 7 Taunt. 597; 1 Moore, 328.

(*n*) Walker *v.* Nussey (1847), 16 M. & W. 302; 16 L. J. Ex. 120; followed in the recent case of Norton *v.* Davison, [1899] 1 Q. B. 401; 68 L. J. Q. B. 265.

Goods not yet in Existence.

[36] LEE *v.* GRIFFIN. (1861)

[1 B. & S. 272; 30 L. J. Q. B. 252.]

This was an action against an executor to recover the price of artificial teeth made for his testatrix, who had died before they were ready. The price of the teeth being £21, and there being no writing, the 17th section of the Statute of Frauds prevented the dentist from recovering for goods sold and delivered, but it was suggested that the count for work, labour, and materials might be sustained. This view, however, was not adopted, the rule being stated to be that *if the contract be such that when carried out it would result in transferring for a price from one person to another a chattel in which the latter had no previous property, it is a contract for the sale of a chattel*, and unless that be the case there can be no sale. "I think that in all cases," said Blackburn, J., "in order to ascertain whether the action ought to be brought for goods sold and delivered, or for work and labour done and materials provided, we must look at the particular contract entered into between the parties. *If the contract be such that, when carried out, it would result in the sale of a chattel, the party cannot sue for work and labour;* but, if the result of the contract is that the party has done work and labour which ends in nothing that can become the subject of a sale, the party cannot sue for goods sold and delivered. The case of an attorney employed to prepare a deed is an illustration of this latter proposition. It cannot be said that the paper and ink he uses in the preparation of the deed are goods sold and delivered. The case of a printer printing a book would most probably fall within the same category . . . .

I do not think that the test to apply to these cases is whether the value of the work exceeds that of the materials used in its execution; for, if a sculptor were employed to execute a work of art, greatly as his skill and labour, supposing it to be of the highest description, might exceed the value of the marble on which he worked, the contract would, in my opinion, nevertheless be a contract for the sale of a chattel."

Prior to Lord Tenterden's Act (9 Geo. IV. c. 14, s. 7), there had been many conflicting decisions on the question whether the Statute of Frauds applied to executory agreements as well as to bargains and sales. By that Act the provisions of the original statute were extended to executory agreements, the two Acts being by implication incorporated. Both Acts, however, were repealed (so far as they related to this question) by the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), sect. 4, sub-sect. 2 of which provides that: "The provisions of this section apply to every such contract, notwithstanding that the goods may be intended to be delivered at some future time, or may not at the time of such contract be actually made, procured, or provided, or fit or ready for delivery, or some act may be requisite for the making or completing thereof, or rendering the same fit for delivery."

Where goods are not in existence at the time of the contract, but are to be made and delivered at some future time, the question may arise (as in the leading case) whether such contract is a contract for the *sale of goods* so as to be within the statute, *or* is a contract for *work and materials* so that writing is unnecessary? Under the former statutes there were numerous decisions and much diversity and even conflict of opinion as to the proper test by which this question should be determined (*o*). "In reviewing these decisions, it is surprising to find that a rule so satisfactory and apparently so obvious as that laid down in Lee *v.* Griffin, in 1861, should not have been earlier suggested by some of the eminent judges who had been called on to consider the subject, beginning with Lord Ellenborough in 1814, and closing with Pollock, C. B., in 1856" (*p*). The definition of a contract of sale of goods given in sect. 1 of the Sale of Goods Act, clearly

(*o*) A full discussion of the cases on this subject is to be found in Benjamin on Sale, pp. 96—108 (4th ed.).

(*p*) *Ibid.* p. 105.

distinguished it from a contract for the supply of labour and materials.

Clay *v.* Yates.

In the case of Clay *v.* Yates(*q*), it was held that an agreement by a printer to print a book, although it involved finding materials, was not a contract for the sale of goods, but was a contract for work and materials. It has, however, been pointed out(*r*), that in this case, and also in the case of the solicitor and the deed suggested by Blackburn, J., in Lee *v.* Griffin, the author's copyright in the book and the client's interest in the deed qualify the proprietary rights of the printer or the solicitor respectively. In fact, there is no sale, because the employer has a previous property in the chattel.

Isaacs *v.* Hardy.

It was decided in the case of Isaacs *v.* Hardy (*s*), that a contract by an artist with a picture dealer to paint a picture of a given subject at an agreed price was a contract for the sale of a chattel. At one time it was thought that the test to be applied to such cases was *whether the value of the work exceeded the value of the materials;* but that rule has now yielded to the one laid down in the leading case.

Contracts for the affixing to the freehold, &c. of moveables.

But contracts for the sale of goods must be distinguished from contracts for the affixing to the freehold or to another chattel of a moveable thing of any kind. "In such contracts the intention is plainly not to make a sale of moveables, but to make improvements on real property or on another chattel" (*t*). In other words, the complete thing sold is never sold *as a chattel*, nor are its incomplete materials, though chattels, sold at all in the incomplete state (*u*).

(*q*) (1856), 25 L. J. Ex. 237; 1 H. & N. 73.

(*r*) Law Quarterly Review (1885), p. 9, note 4; per Mr. Justice Stephen and Mr. F. Pollock.

(*s*) (1884), 1 C. & E. 287.

(*t*) Benjamin on Sale, p. 108 (4th ed.), quoting Tripp *v.* Armitage (1839), 4 M. & W. 687; 1 H. & H. 442; Clark *v.* Bulmer (1843), 11 M. & W. 243; and see Anglo-Egyptian Nav. Co. *v.* Rennie (1875), L. R. 10 C. P. 271; 44 L. J. C. P. 130, where the contract was to make and fix boilers to a ship.

(*u*) Ker and Pearson-Gee in "Commentary on Sale of Goods Act," p. 4, quoting *per cur.* in Clark *v.* Bulmer, *supra*, at p. 250.

NEGOTIABLE INSTRUMENTS.

Negotiable Instruments are Transferable like Cash on Delivery.

MILLER *v.* RACE. (1791) [37]

[1 Burr. 452.]

One December night, about a century ago, the mail from London to the West was attacked by highwaymen. Amongst other things taken was a banknote for £21 10*s.*, which a Mr. Finney of London was sending down by the general post to a client in Oxfordshire. The next day the news of the disaster reached the ears of Mr. Finney, who rushed off immediately to the bank and stopped payment of the note.

A few days afterwards, the plaintiff, who had come by the note quite honestly and had given value for it, presented it at the bank; but Mr. Race, one of the bank clerks, not only refused to cash it, but even to hand it back. Miller therefore sued him, and succeeded in making him cash it.

Nemo dat quod non habet.

The leading case engrafts on the well-known rule, that *no one can acquire a title to a chattel personal from a man who has himself no title to it*, an exception in favour of all negotiable instruments. Whenever a man receives one of these instruments *bonâ fide*, and having given valuable consideration for it, he is not to lose his money because the document's history is of an unsatisfactory

Exception in favour of negotiable instruments.

Unless taken *malâ fide*.

character (*a*). If, however, he receives it *malâ fide*, it is different. A good-for-nothing clerk received some notes and money for his master, and then went and laid them out with the defendant in illegal insurances of lottery tickets. The defendant knew that he was doing wrong: so the clerk's master was allowed, on proving their identity, to recover them (*b*). But *mala fides*, in such cases, must always be distinctly proved: it will not be sufficient to show that the defendant was guilty of carelessness in taking the instrument, if he did not take it dishonestly (*c*). The judgment of Lord Herschell in the London Joint Stock Bank *v.* Simmons (*d*), contains an excellent discussion of the law on this point. After approving the earlier authorities (*e*), which establish the rule that negligence does not invalidate the title of a person taking a negotiable instrument in good faith and for value, the learned lord added:—"I should be very sorry to see the doctrine of constructive notice introduced into the law of negotiable instruments. But regard to the facts of which the taker of such instruments had notice is most material in considering whether he took in good faith. If there be anything which excites the suspicion that there is something wrong in the transaction, the taker of the instrument is not acting in good faith if he shuts his eyes to the facts presented to him, and puts the suspicions aside without further inquiry."

London Joint Stock Bank *v.* Simmons.

Holder for value.

As to what constitutes a "holder for value," the recent case of the Royal Bank of Scotland *v.* Tottenham (*f*) may be referred to. It was there held, that when a person pays a cheque into his bank in order that the amount of it may be placed to the credit of his account, and the amount is so placed, the bank are holders for value of the cheque.

Various kinds of

A negotiable instrument has been defined as *an instrument which*

(*a*) See, however, the (so-called) important case of Bank of England *v.* Vagliano, [1891] A. C. 107; 60 L. J. Q. B. 145; although the judgments are instructive, Lord Bramwell was not far wrong in saying that "the head-note which will represent the decisions of your Lordships should be in a strictly concrete form, stating the facts and saying that on them it was held that judgment should be for the appellants."

(*b*) Clarke *v.* Shee (1774), Cowp. 199.

(*c*) Goodman *v.* Harvey (1836), 4 Ad. & E. 870; 6 N. & M. 372.

(*d*) [1892] A. C. 201; 61 L. J. Ch. 723.

(*e*) Per Parke, B., in Foster *v.* Pearson (1835), 1 C. M. & R. at p. 855; 4 L. J. (N. S.) Ex. 120; per Lord Brougham in Bank of Bengal *v.* Fagan (1852), 7 Moore, P. C. 72; per Willes, J., in Raphael *v.* Bank of England (1855), 17 C. B. at p. 175. Accordingly, Gill *v.* Cubitt (1824), 3 B. & C. 466, and Down *v.* Halling (1825), 4 B. & C. 330, are overruled on this point.

(*f*) [1894] 2 Q. B. 715; 64 L. J. Q. B. 99; following *Ex parte* Richdale (1882), 19 Ch. D. 409; 51 L. J. Ch. 462. And see Redfern *v.* Rosenthal (1902), 86 L. T. 855.

upon delivery transfers the legal right to the property secured by it to the person to whom it is delivered. The most familiar negotiable instruments are bills and notes. A bill of exchange is an unconditional order in writing addressed by one person to another (*g*), signed by the person giving it, requiring the person to whom it is addressed to pay on demand or at a fixed or determinable future time a sum certain in money to or to the order of a specified person, or to bearer (*h*). To these may be added government bonds, dock warrants, King of Prussia bonds, and all instruments to which by the law merchant or by statute the above incident attaches. It is doubtful whether in England any instrument can become negotiable except by the law merchant or by statute. In 1872 a company called the Credit Foncier of England issued a debenture for £100 *payable to bearer*. By-and-by, and after a robbery, this apparently negotiable instrument got into the hands of a Mr. Crouch, who sued on it; but it was held that the company were not bound to pay it, as they had no power to issue a negotiable instrument of a novel kind (*i*). The scrip, however, of a foreign government issued by it on negotiating a loan, which is by the custom of all the stock markets in Europe negotiable, is so regarded by English law (*k*); and so are scrip certificates of a banking company which have for many years been treated as negotiable instruments by bankers, discounters, and people on the Stock Exchange (*l*). It has recently been decided (*m*), that where a mercantile usage to treat as negotiable the debentures

negotiable instruments.

How negotiable instrument arises.

Crouch and his worthless debenture.

Scrip of foreign government.

Scrip certificates of banking company.

(*g*) See Gordon *v.* London City and Midland Bank, [1903] A. C. 240; 72 L. J. K. B. 451.

(*h*) As to these, see the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), s. 3; *In re* Boyse (1886), 33 Ch. D. 612; 56 L. J. Ch. 135; Chamberlain *v.* Young, [1893] 2 Q. B. 206; 63 L. J. Q. B. 28. And see Kirkwood *v.* Carroll, [1903] 1 K. B. 531; 72 L. J. K. B. 208; overruling Kirkwood *v.* Smith, [1896] 1 Q. B. 582; 65 L. J. Q. B. 408; and approving Yates *v.* Evans (1892), 61 L. J. Q. B. 446; 66 L. T. 532.

(*i*) Crouch *v.* Credit Foncier of England (1873), L. R. 8 Q. B. 374; 42 L. J. Q. B. 183; but see Earl of Sheffield *v.* London Joint Stock Bank (1888), 13 App. Cas. 333; 57 L. J. Ch. 986; Venables *v.* Baring, [1892] 3 Ch. 537; 61 L. J. Ch. 609; Bentinck *v.* London Joint Stock Bank, [1893] 2 Ch. 120; 62 L. J. Ch. 358.

(*k*) Goodwin *v.* Robarts (1876), 1 App. Cas. 476; 45 L. J. Ex. 748.

(*l*) Rumball *v.* Metr. Bank (1877), 2 Q. B. D. 194; 46 L. J. Q. B. 346.

(*m*) Bechuanaland Exploration Co. *v.* London Trading Bank, [1898] 2 Q. B. 658; 79 L. T. 270; per Kennedy, J. (who discussed and doubted Crouch *v.* Credit Foncier of England, *supra*); approved and followed by Bigham, J., in Edelstein *v.* Schuler, [1902] 2 K. B. 144; 71 L. J. K. B. 572; where it was further held that it is no longer necessary to tender evidence as to the negotiability of bearer bonds, foreign or English, as the existence of the usage has been so often proved that it must now be taken to be part of the law of which the Courts ought to take judicial notice.

of an English company has been proved, the Court will give effect to such usage, *notwithstanding that it may be of recent origin only.*

An instrument may be negotiable, though it has not been issued as such by the party who made it; *e.g.*, where the acceptor tore up a bill with the intention of cancelling it, and the drawer surreptitiously pasted the pieces together, and indorsed it away (*n*). It is otherwise, however, if the instrument be issued *incomplete* (*o*).

The drawer of a cheque, perfect in form, but drawn in favour of a non-existing person, is liable to a *bonâ fide* holder for value who has no notice of any irregularity, and it is immaterial whether or not the drawer was induced to sign the cheque by fraud. Such a cheque must be treated as payable to bearer under sect. 7, subsect. 3, of the Bills of Exchange Act, 1882 (*p*).

Restricting negotiability.

Negotiability may sometimes be restricted; *e.g.*, a cheque may be crossed (*q*) or a bill specially indorsed (*r*). But if the acceptor of a bill of exchange desires to qualify his acceptance, he must do so on the face of the bill in clear and unequivocal terms, and so that any person taking the bill could not, if he acted reasonably, fail to understand that it was accepted, subject to an express qualification (*s*).

Renewal of bill.

An agreement to "renew" a bill means, in the absence of anything to the contrary, that a bill shall be given between the same parties for the same amount, for the same period as and commencing from the date of the expiration of the original bill (*t*). But evidence of a contemporaneous *oral* agreement to renew a bill is inadmissible in an action upon the bill (*u*).

Computation of time of payment.

When a bill is not payable on demand, the day on which it falls due is determined as follows:—

(1.) Three days, called days of grace, are, in every case where the

(*n*) Ingham *v.* Primrose (1859), 7 C. B. N. S. 82; 28 L. J. C. P. 294; and see Scholfield *v.* Londesborough, [1896] A. C. 514; 65 L. J. Q. B. 593.

(*o*) Baxendale *v.* Bennett (1878), 3 Q. B. D. 525; 47 L. J. C. P. 624; Herdman *v.* Wheeler, [1902] 1 K. B. 361; 71 L. J. K. B. 270.

(*p*) See Clutton *v.* Attenborough, [1897] A. C. 90; 66 L. J. Q. B. 221.

(*q*) 45 & 46 Vict. c. 61, ss. 76—82; and see National Bank *v.* Silke, [1891] 1 Q. B. 435; 60 L. J. Q. B. 199. As to who is a "customer" of a bank within the meaning of sect. 82, see G. W. Ry. Co. *v.* London and County Banking Co., [1901] A. C. 414; 70 L. J. K. B. 915. And as to the rights of a banker under this section, see Gordon *v.* London City and Midland Bank, [1902] A. C. 240; 72 L. J. K. B. 451.

(*r*) Sigourney *v.* Lloyd (1828), 8 B. & C. 622; 3 M. & R. 58.

(*s*) See Meyer *v.* Decroix, [1891] A. C. 520; 61 L. J Q. B. 205.

(*t*) Barber *v.* Mackrell (1892), 67 L. T. 108; 40 W. R. 618; but see also 68 L. T. 29; 41 W. R. 341.

(*u*) New London Credit Syndicate *v.* Neale, [1898] 2 Q. B. 487; 67 L. J. Q. B. 825.

bill itself does not otherwise provide, added to the time of payment as fixed by the bill, and the bill is due and payable on the last day of grace (*x*). Provided that—

(a) When the last day of grace falls on Sunday, Christmas Day, Good Friday, or a day appointed by royal proclamation as a public fast or thanksgiving day, the bill is, except in the case hereinafter provided for, due and payable on the preceding business day;

(b) When the last day of grace is a bank holiday (other than Christmas Day or Good Friday) under the Bank Holidays Act, 1871, and Acts amending or extending it, or when the last day of grace is a Sunday and the second day of grace is a bank holiday, the bill is due and payable on the succeeding business day (*y*).

(2.) When a bill is payable at a fixed period after date, after sight, or after the happening of a specified event, the time of payment is determined by excluding the day from which the time is to begin to run and by including the day of payment.

(3.) When a bill is payable at a fixed period after sight, the time begins to run from the date of the acceptance, if the bill be accepted, and from the date of noting or protest if the bill be noted or protested for non-acceptance, or for non-delivery (*z*).

(4.) The term "month" in a bill means calendar month (*a*).

Negotiation of overdue or dishonoured bill.

It is provided by the 36th section of the Bills of Exchange Act, 1882 (*b*), that—

"(1.) Where a bill is negotiable in its origin it continues to be negotiable until it has been (a) restrictively indorsed or (b) discharged by payment or otherwise.

(2.) Where an overdue bill is negotiated, it can only be nego-

(*x*) But, although the holder may present the bill for payment at any reasonable hour on the day it becomes payable, that is, ordinarily, on the third day of grace, and if it is not then paid may at once give notice of dishonour to the parties liable upon it; yet even after dishonour he is not entitled (at least when the acceptance is general) to commence an action upon the bill before the expiration of the last day of grace. Kennedy *v.* Thomas, [1894] 2 Q. B. 759; 63 L. J. Q. B. 761.

(*y*) As to the term "business day," see sect. 92.

(*z*) Campbell *v.* French (1795), 6 T. R. 200.

(*a*) 45 & 46 Vict. c. 61, s. 14. Webb *v.* Fairmaner (1838), 3 M. & W. 473; 7 L. J. Ex. 140; and Simpson *v.* Margitson (1842), 11 Q. B. 23; 17 L. J. Q. B. 81.

(*b*) 45 & 46 Vict. c. 61.

tiated subject to any defect of title affecting it at its maturity, and thenceforward no person who takes it can acquire or give a better title than that which the person from whom he took it had (*c*).

(3.) A bill payable on demand is deemed to be overdue within the meaning and for the purposes of this section, when it appears on the face of it to have been in circulation for an unreasonable length of time. What is an unreasonable length of time for this purpose is a question of fact.

(4.) Except where an indorsement bears date after the maturity of the bill, every negotiation is *primâ facie* deemed to have been effected before the bill was overdue.

(5.) Where a bill which is not overdue has been dishonoured, any person who takes it with notice of the dishonour takes it subject to any defect of title attaching thereto at the time of dishonour, but nothing in this sub-section shall affect the rights of a holder in due course."

Notice of Dishonour.

[38] BICKERDIKE *v.* BOLLMAN. (1786)

[1 T. R. 405; 1 R. R. 242.]

The effect of this case is this :—Spendfast being in want of money asked Lighthead to accept a bill of exchange for him, assuring him that he would never be called on to pay it, and that it was really only a formality. Lighthead consented, and though he got no consideration whatever for it, accepted a bill drawn on him by Spendfast. The bill finally got into the hands of Thriftman as holder, and he presented it to Lighthead for payment; but he dishonoured the bill. Such being the state of the parties, Bickerdike *v.* Bollman decides that Thriftman, the holder, can sue Spendfast, the drawer, without having previously given him notice that Lighthead, the acceptor, has dis-

(*c*) See Alcock *v.* Smith, [1892] 1 Ch. 238; 61 L. J. Ch. 161.

honoured the bill, the reason being that the drawer never had any effects in the hands of the drawee, and therefore *could not lose anything by notice not being given him.*

The necessity of cases on this subject has been happily superseded by codification, the 47th, 48th, 49th and 50th sections of the Bills of Exchange Act, 1882 (*d*), being as follows:—

Dishonour by non-payment.

"47.—(1.) A bill is dishonoured by non-payment (a) when it is duly presented for payment, and payment is refused or cannot be obtained, or (b) when presentment is excused and the bill is overdue and unpaid.

(2.) Subject to the provisions of this Act, when a bill is dishonoured by non-payment, an immediate right of recourse against the drawer and indorsers accrues to the holder.

Notice of dishonour and effect of non-notice.

"48. Subject to the provisions of this Act, when a bill has been dishonoured by non-acceptance or by non-payment, notice of dishonour must be given to the drawer and each indorser (*e*), and any drawer or indorser to whom such notice is not given is discharged; Provided that—

(1.) Where a bill is dishonoured by non-acceptance, and notice of dishonour is not given, the rights of a holder in due course subsequent to the omission shall not be prejudiced by the omission.

(2.) Where a bill is dishonoured by non-acceptance and due notice of dishonour is given, it shall not be necessary to give notice of a subsequent dishonour by non-payment unless the bill shall in the meantime have been accepted.

Rules as to notice of dishonour.

"49. Notice of dishonour in order to be valid and effectual must be given in accordance with the following rules:—

(1.) The notice must be given by or on behalf of the holder, or by or on behalf of an indorser who, at the time of giving it, is himself liable on the bill.

(2.) Notice of dishonour may be given by an agent either in his

(*d*) 45 & 46 Vict. c. 61.

(*e*) "Notice of dishonour" means notification of dishonour, *i.e.*, formal notice: Burgh *v.* Legge (1839), 5 M. & W. at p. 422, Alderson, B.; Carter *v.* Flower (1847), 16 M. & W. at p. 749, Parke, B. The fact that the drawer or indorser of a bill knows that it has been dishonoured does not dispense with the necessity for giving him notice of dishonour: Miers *v.* Brown (1843), 11 M. & W. 372; East *v.* Smith (1847), 16 L. J. Q. B. 292; cf. Caunt *v.* Thompson (1849), 18 L. J. C. P. 125; 7 C. B. 400. And see the recent decision of Buckley, J., in the case of *In re* Fenwick, Stobart & Co., *Ex parte* Deep-Sea Fishery Co., [1902] 1 Ch. 507; 71 L. J. Ch. 321.

own name, or in the name of any party entitled to give notice, whether that party be his principal or not (*f*).

(3.) Where the notice is given by or on behalf of the holder, it enures for the benefit of all subsequent holders and all prior indorsers who have a right of recourse against the party to whom it is given.

(4.) Where notice is given by or on behalf of an indorser entitled to give notice as hereinbefore provided, it enures for the benefit of the holder and all indorsers subsequent to the party to whom notice is given (*g*).

(5.) The notice may be given in writing or by personal communication, and may be given in any terms which sufficiently identify the bill (*h*), and intimate that the bill has been dishonoured by non-acceptance or non-payment.

(6.) The return of a dishonoured bill to the drawer or an indorser is, in point of form, deemed a sufficient notice of dishonour.

(7.) A written notice need not be signed (*i*), and an insufficient written notice may be supplemented and validated by verbal communication. A misdescription of the bill shall not vitiate the notice unless the party to whom the notice is given is in fact misled thereby.

(8.) Where notice of dishonour is required to be given to any person, it may be given either to the party himself, or to his agent in that behalf.

(9.) Where the drawer or indorser is dead, and the party giving notice knows it, the notice must be given to a personal representative if such there be, and with the exercise of reasonable diligence he can be found.

(10.) Where the drawer or indorser is bankrupt, notice may be given either to the party himself or to the trustee.

(11.) Where there are two or more drawers or indorsers who are

(*f*) See Harrison *v.* Ruscoe (1846), 15 M. & W. 231; 15 L. J. Ex. 110. Notice of dishonour may be given either personally, or by messenger or other agent, or through the post-office. See sub-sect. (15), *post*, as to loss or miscarriage in the post. If the drawer or indorser has a place of business the notice should be addressed to him there; if he has not, then it should be addressed to him at his residence. Berridge *v.* Fitzgerald (1869), L. R. 4 Q. B. 631; 38 L. J. Q. B. 335. As to the validity of a notice of dishonour sent to the wrong address, see the recent case of Fielding *v.* Corry, [1898] 1 Q. B. 268; 67 L. J. Q. B. 7.

(*g*) See Chapman *v.* Keane (1835), 3 A. & E. 193; 4 L. J. K. B. 185; Lysaght *v.* Bryant (1850), 19 L. J. C. P. 160; 9 C. B. 46.

(*h*) Shelton *v.* Braithwaite (1841), 7 M. & W. 436.

(*i*) Maxwell *v.* Brain (1864), 10 L. T. 301; 12 W. R. 688; but it must come from the right person: see sub-sects. (1) and (2).

not partners, notice must be given to each of them, unless one of them has authority to receive such notice for the others.

(12.) The notice may be given as soon as the bill is dishonoured, and must be given within a reasonable time thereafter.

In the absence of special circumstances notice is not deemed to have been given within a reasonable time, unless—

(a) Where the person giving and the person to receive notice reside in the same place, the notice is given or sent off in time to reach the latter on the day after the dishonour of the bill.

(b) Where the person giving and the person to receive notice reside in different places, the notice is sent off on the day after the dishonour of the bill, if there be a post at a convenient hour on that day, and if there be no such post on that day then by the next post thereafter.

(13.) Where a bill when dishonoured is in the hands of an agent, he may either himself give notice to the parties liable on the bill, or he may give notice to his principal. If he gives notice to his principal, he must do so within the same time as if he were the holder, and the principal upon receipt of such notice has himself the same time for giving notice as if the agent had been an independent holder.

(14.) Where a party to a bill receives due notice of dishonour, he has after the receipt of such notice the same period of time for giving notice to antecedent parties that the holder has after the dishonour.

(15.) Where a notice of dishonour is duly addressed and posted, the sender is deemed to have given due notice of dishonour, notwithstanding any miscarriage by the post office.

Excuses for non-notice and delay.

"50.—(1.) Delay in giving notice of dishonour is excused where the delay is caused by circumstances beyond the control of the party giving notice, and not imputable to his default, misconduct, or negligence. When the cause of delay ceases to operate, the notice must be given with reasonable diligence.

(2.) Notice of dishonour is dispensed with—

(a) When, after the exercise of reasonable diligence, notice as required by this Act cannot be given to or does not reach the drawer or indorser sought to be charged (*k*).

(b) By waiver, express or implied (*l*). Notice of dishonour

(*k*) But notice *must* be given, if at *any* time before action the holder can find the drawer or indorser, though he could not find him at the time of dishonour. See Studdy *v.* Beesby (1889), 60 L. T. 647.

(*l*) Waiver of notice of dishonour in favour of the holder enures for

may be waived before the time of giving notice has arrived, or after the omission to give due notice:

(c) As regards the drawer in the following cases, namely, (1) where drawer and drawee are the same person (*m*), (2) where the drawee is a fictitious person or a person not having capacity to contract, (3) where the drawer is the person to whom the bill is presented for payment, (4) where the drawee or acceptor is, as between himself and the drawer, under no obligation to accept or pay the bill (*n*), (5) where the drawer has countermanded payment:

(d) As regards the indorser in the following cases, namely, (1) where the drawee is a fictitious person or a person not having capacity to contract, and the indorser was aware of the fact at the time he indorsed the bill, (2) where the indorser is the person to whom the bill is presented for payment, (3) where the bill was accepted or made for his accommodation."

As to the consideration for bills and notes, see *post*, p. 159.

the benefit of parties prior to such holder as well as subsequent holders (Raby *v.* Gilbert (1861), 30 L. J. Ex. 170; 6 H. & N. 536); but waiver of such notice by an indorser does not affect parties prior to such indorser (Turner *v.* Leech (1821), 4 B. & Ald. 451; 23 R. R. 344). An acknowledgment of liability must be made with full knowledge of the facts in order to operate as a waiver of notice of dishonour. Goodall *v.* Dolley (1787), 1 T. R. 712; 1 R. R. 372; and see Pickin *v.* Graham (1833), 1 Cr. & M. at p. 729; 2 L. J. Ex. 253.

(*m*) It is not true as a general proposition that the knowledge of a fact which comes to a person as secretary of one company is notice of the fact to him as secretary of another company from the mere existence of the common relationship. The question in such a case is whether or not the information he receives as secretary of one company is received by him under such circumstances that it would be his duty to communicate it to the other company. *In re* Fenwick, Stobart & Co., *Ex parte* Deep-Sea Fishery Co., [1902] 1 Ch. 507; 71 L. J. Ch. 321.

(*n*) See Bickerdike *v.* Bollman, *supra*. *Primâ facie* the acceptor is, as between himself and the drawer, the person bound to pay it; but evidence is admissible to show that he is in reality a mere surety for the drawer or some other party. Cook *v.* Lister (1863), 32 L. J. C. P. 127; 7 L. T. 712.

CONSIDERATION.

Adequacy of Consideration not required.

THORNBOROW *v.* WHITACRE. (1706) [39]

[2 Ld. Raym. 1164.]

"Farmer Whitacre," said the cunning Thornborow, "let us strike a bargain. If I pay you a five pound note down now, will you give me 2 rye corns next Monday, 4 on Monday week, 8 on Monday fortnight, and so on,—doubling it every Monday,—for a year." Whitacre jumped at it; five pounds never were earned so easily. So the thing was settled. But when our yokel friend came to calculate how much rye he should have to deliver he found that it came to *more than was grown in a year in all England.*

Thornborow, however, brought his action, and had the case not been compromised, would probably have succeeded; for the Court intimated that they thought the contract binding, on the ground that there was a consideration; and as for the other point raised for the defendant, that it was an impossible contract, it was only impossible in respect of the defendant's ability.

Necessity for consideration.

Every promise (when the contract is not by deed) requires, both at law and in equity (*a*), a valuable consideration to support it (*b*).

(*a*) See *Re* Whitaker (1889), 42 Ch. 119; 58 L. J. Ch. 487.

(*b*) "Valuable consideration" has been defined as "*some right,*

Nuda pactio non parit obligationem. But law courts are satisfied with the *existence* of a consideration, and do not trouble themselves about its *adequacy*. No matter how slight may be the *benefit* to the promisor, or the *detriment* to the promisee (whichever the consideration may happen to be), it is sufficient to support the promise. In one case a man allowed a friend to take some boilers and weigh them. Afterwards he brought an action against him for not keeping his promise to restore them, after weighing, in as good condition as they were before. For this promise it was held that the mere *allowing to weigh* was a sufficient consideration (*c*). So in another case it was held that the surrender of the possession of a worthless document was a sufficient consideration (*d*). *Forbearance to sue* in the case of a doubtful claim is also a sufficient consideration (*e*); and so is a compromise of a *bonâ fide* claim, although it may not be sustainable in law (*f*). And so is *labour*, though unsuccessful (*g*). But for a man to do something he is *already bound to do* cannot be a consideration. If, however, the agreement is for the man to do something *slightly in excess of his duty*, it will be enough (*h*).

Adequacy not required.

Slight acts which may be consideration.

Marriage is, in law, a valuable consideration sufficient to support a promise. Thus, in the recent case of Synge *v.* Synge (*i*), a husband having promised before and in consideration of marriage to leave by will certain hereditaments to his wife conveyed the premises by a deed to a third person; and the Court held that this was a breach

Marriage.

interest, profit, or benefit accruing to the one party, or some forbearance, detriment, loss, or responsibility given, suffered, or undertaken by the other." See per Lush, J., in Currie *v.* Misa (1875), L. R. 10 Ex. at p. 162; 44 L. J. Ex. 94; approved but affirmed on another ground, 1 App. Cas. 554; 45 L. J. Q. B. 852; and see per Bowen, L. J., in Carlill *v.* Carbolic Smoke Ball Co., [1893] 1 Q. B. at pp. 271, 272; 62 L. J. Q. B. 257.

(*c*) Bainbridge *v.* Firmstone (1838), 8 Ad. & E. 743; 1 P. & D. 2. See also Coggs *v.* Bernard (1704), 2 Ld. Raym 909, *post*, p. 289.

(*d*) Brooks *v.* Haigh (1840), 10 Ad. & E. 323; 3 P. & D. 452.

(*e*) Longridge *v.* Dorville (1821), 5 B. & Ald. 117; Willatts *v.* Kennedy (1832), 8 Bing. 5; 1 L. J. C. P. 4; Wade *v.* Simeon (1846), 2 C. B. 548; 15 L. J. C. P. 114; and see Crears *v.* Hunter (1887), 19 Q. B. D. 341; 56 L. J. Q. B. 518; Aldridge *v.* Aldridge (1888), 13 P. D. 210; 58 L. J. P. 8.

(*f*) Miles *v.* New Zealand Co. (1886), 32 Ch. D. 266; 55 L. J. Ch. 801; Kingsford *v.* Oxenden (1891), 55 J. P. 182 and 789; but see *Ex parte* Banner (1881), 17 Ch. D. 480; 44 L. T. 908.

(*g*) Lampleigh *v.* Brathwait, *post*, p. 163.

(*h*) England *v.* Davidson (1840), 11 A. & E. 856; 3 P. & D. 594; and Hartley *v.* Ponsonby (1857), 7 E. & B. 872; 26 L. J. Q. B. 322.

(*i*) [1894] 1 Q B. 466; 63 L. J. Q. B. 202. And see Harrison *v.* Cage (1699), 1 Ld. Raym. 386; 5 Mod. 412; and Harvey *v.* Johnston (1848), 6 C. B. 295; 17 L. J. C. P. 298.

of contract producing an immediate cause of action within the rule of Hochster *v.* De la Tour (*k*).

A curious case on this branch of the law is Shadwell *v.* Shadwell (*l*), where an amiable old gentleman wrote to his nephew— Shadwell *v.* Shadwell.

"*My dear L.,*

"*I am glad to hear of your intended marriage with E. N., and as I promised to assist you at starting, I am happy to tell you that I will pay you* 150*l. yearly during my life, and until your annual income, derived from your profession of a Chancery barrister, shall amount to* 600 *guineas, of which your own admission will be the only evidence I shall receive or require.*

"*Your ever affectionate uncle,*

"*C. S.*"

In an action which it became necessary to bring against the old man's executors, it was held that this letter *amounted to a request to* his nephew to marry E. N., and that his promise therefore had a consideration, and was binding.

In order for there to be a contract of *sale*, the consideration must consist wholly or in part (*m*) of *money* paid or promised (*n*). If goods be given in exchange for goods, it is a barter (*o*). So also goods may be given in consideration of work and labour done, or for rent, or for board and lodging (*p*) or any valuable consideration other than money, but they are not sales. The legal effects of such special contracts are generally, but not always, the same as in the case of sales (*q*); and the Sale of Goods Act, 1893, does not apply to them. In sales consideration must be money.

The consideration for bills of sale must be truly stated: see *post*, p. 362. Bills of sale.

In the case of bills of exchange and promissory notes a consideration is presumed till the contrary is shown (*r*). The Bills of Ex- Consideration of bills and notes.

(*k*) See *post*, p. 419.

(*l*) (1860), 9 C. B. N. S. 150; 30 L. J. C. P. 145; and see Bell *v.* Bassett (1882), 52 L. J. Q. B. 22; 47 L. T. 19; Harston *v.* Harvey (1881), 1 C. & E. 404; *In re* Eyre, McAndrew *v.* Norris (1895), 72 L. T. 585; 43 W. R. 538; and *In re* Holland, Gregg *v.* Holland, [1902] 2 Ch. 360; 71 L. J. Ch. 518.

(*m*) Sheldon *v.* Cox (1824), 3 B. & C. 120; Hands *v.* Burton (1809), 9 East, 349; Bull *v.* Parker (1843), 7 Jur. 282; 12 L. J. Q. B. 93.

(*n*) Sect. 1 of Sale of Goods Act, 1893 (56 & 57 Vict. c. 71).

(*o*) Harrison *v.* Luke (1845), 14 M. & W. 139; 14 L. J. Ex. 248.

(*p*) Keys *v.* Harwood (1846), 2 C. B. 905; 15 L. J. C. P. 207.

(*q*) See Emmanuel *v.* Dane (1812), 3 Camp. 299; La Neuville *v.* Nourse (1813), 3 Camp. 351; Benj. on Sale, pp. 2, 3 (4th ed.).

(*r*) Mills *v.* Barber (1836), 1 M. & W. 425; 5 L. J. Ch. 204.

change Act, 1882 (45 & 46 Vict. c. 61), deals with the consideration for a bill in the following sections:—

Bills of Exchange Act, 1882.

"27.—(1.) Valuable consideration for a bill may be constituted by,—

(a) Any consideration sufficient to support a simple contract (*s*);

(b) An antecedent debt or liability. Such a debt or liability is deemed valuable consideration whether the bill is payable on demand or at a future time.

Holder for value.

(2.) Where value has *at any time* been given for a bill, the holder is deemed to be a holder for value as regards the acceptor, and all parties to the bill who became parties prior to such time.

(3.) Where the holder of a bill has a lien on it, arising either from contract or by implication of law, he is deemed to be a holder for value to the extent of the sum for which he has a lien (*t*).

Accommodation bill or party.

"28.—(1.) An accommodation party to a bill is a person who has signed a bill as drawer, acceptor, or indorser, without receiving value therefor, and for the purpose of lending his name to some other person.

(2.) An accommodation party is liable on the bill to a holder for value; and it is immaterial whether, when such holder took the bill, he knew such party to be an accommodation party or not.

Holder in due course.

"29.—(1.) A holder in due course is a holder who has taken a bill, complete and regular on the face of it, under the following conditions: namely,

(a) That he became the holder of it before it was overdue, and without notice that it had been previously dishonoured, if such was the fact;

(b) That he took the bill in good faith and for value, and that at the time the bill was negotiated to him he had no notice of any defect in the title of the person who negotiated it (*u*).

(2.) In particular the title of a person who negotiates a bill is

(*s*) *E.g.*, a promise to give up a bill thought to be invalid (Smith *v.* Smith (1863), 13 C. B. 418; 32 L. J. C. P. 149); or a debt barred by the Statute of Limitations (Latouche *v.* Latouche (1865), 3 H. & C. at p. 576; 34 L. J. Ex. 85).

(*t*) The "discount" of a bill must be distinguished from the pledge or deposit of a bill as security. See Chalmers' Bills of Exchange, p. 86 (5th ed.).

(*u*) The payee of a promissory note is not a "holder in due course" within the meaning of this section, inasmuch as he is not a person to whom, after its completion by and as between the immediate parties, the note has been negotiated. See Lewis *v.* Clay (1898), 67 L. J. Q. B. 224; 77 L. T. 653; it was also decided in this case that the law as declared by Foster *v.* Mackinnon ((1869), L. R. 4 C. P. 704; 38 L. J. C. P. 310) is still in force, and has not been altered by the Bills of Exchange Act, 1882.

defective within the meaning of this Act when he obtained the bill, or the acceptance thereof, by fraud, duress, or force and fear, or other unlawful means, or for an illegal consideration, or when he negotiates it in breach of faith, or under such circumstances as amount to a fraud.

(3.) A holder (whether for value or not) who derives his title to a bill through a holder in due course, and who is not himself a party to any fraud or illegality affecting it, has all the rights of that holder in due course as regards the acceptor and all parties to the bill prior to that holder.

Presumption of value and good faith.

"30.—(1.) Every party whose signature appears on a bill is *primâ facie* deemed to have become a party thereto for value.

(2.) Every holder of a bill is *primâ facie* deemed to be a holder in due course; but if in an action on a bill it is admitted or proved that the acceptance, issue, or subsequent negotiation of the bill is affected with fraud, duress, or force and fear, or illegality, the burden of proof is shifted, unless and until the holder proves that, subsequent to the alleged fraud or illegality, value has in good faith been given for the bill" (*x*).

The cases of Stott *v.* Fairlamb (*y*), and Currie *v.* Misa (*z*), should be referred to with regard to an antecedent debt or liability as consideration for a promissory note. Where there exists a debt or liability *in præsenti*, payable *in futuro*, and a state of things exists which entitles the debtor to make payment *at once*, the giving of a promissory note is a conditional payment, and is not without consideration.

Inadequacy may suggest fraud.

Although, as has been said above, it is all very well in theory that it does not matter *what* the consideration is, provided there *is* one, yet, if the inadequacy is very striking indeed, the presumption of *fraud* arises, and a defendant may, on that ground, dispute his liability. The clown Whitacre might have done this. As it was he simply demurred to the declaration, and the issue of fraud was not raised.

Stranger to consideration.

A *stranger to the consideration* cannot sue upon a contract, although it may have been entered into expressly for his benefit, and he may be a near relation of the person from whom the consideration moved (*a*).

(*x*) See, per Lord Blackburn, in Jones *v.* Gordon (1877), 2 App. Cas. 616; 47 L. J. B. 1; and Tatam *v.* Haslar (1889), 23 Q. B. D. 345; 58 L. J. Q. B. 432.

(*y*) (1883), 53 L. J. Q. B. 47; 49 L. T. 525.

(*z*) (1875), L. R. 10 Ex. 153; 44 L. J. Ex. 94; affirmed 1 App. Cas. 554; 45 L. J. Q. B. 852.

(*a*) Tweddle *v.* Atkinson (1861), 1 B. & S. 393; 30 L. J. Q. B. 295; Gandy *v.* Gandy (1885), 30 Ch. D. 57; 54 L. J. Ch. 1154.

Failure of consideration.

Money paid away can sometimes be recovered back on the ground of *failure of consideration*, *e.g.*, money paid for the services of another which are performed so badly as to be quite useless to the employer (*b*); so, too, the buyer may recover the price paid to a seller who has impliedly warranted his title to the goods, when the goods prove to be stolen goods, which the buyer is compelled to restore to the true owner (*c*). But, unless the consideration be severable, and the price apportionable accordingly (*d*), the failure must be *total*, and not merely *partial*. A man apprenticed his son to a watchmaker, and paid a heavy premium. In a year's time the watchmaker died, but it was held that not a farthing of the premium could be recovered, because the lad had got a year's teaching out of the deceased, and therefore the failure of consideration was only partial (*e*). And the later case of Ferns *v.* Carr (*f*) is to the same effect. There a Mr. Ferns was, in November, 1880, bound as an articled clerk for five years to a solicitor named Carr, and a premium of £150 was paid. In December, 1883, Carr died, leaving no partner to continue Ferns' legal education during the remaining two years of the articles. In an action by Ferns' father against Carr's executors, it was held that the estate was not liable for the return of any part of the premium. But in the articles of clerks to solicitors, the Court *may* apportion the premium and order a return of a part, in exercise of its jurisdiction over the solicitor as an officer of the Court (*g*). Upon the dissolution of a partnership the Court may apportion a premium paid upon admission, and order repayment of a part (*h*).

Goods which

The rule that when there is a contract for the sale of specific

(*b*) Bostock *v.* Jardine (1865), 3 H. & C. 700; 34 L. J. Ex. 142. But see Columbus Co. *v.* Clowes, [1903] 1 K. B. 244; 72 L. J. K. B. 330. But the buyer will not succeed on the ground of failure of consideration if the goods delivered are those which he intended to buy, although they may turn out to be worthless: Lambert *v.* Heath (1846), 15 M. & W. 486; 15 L. J. Ex. 297.

(*c*) Eichholtz *v.* Banister (1864), 17 C. B. N. S. 708; 34 L. J. C. P. 105. This subject is fully treated in Chitty on Contracts, pp. 87—92 (12th ed.).

(*d*) Devaux *v.* Conolly (1849), 8 C. B. 640; 19 L. J. C. P. 71.

(*e*) Whincup *v.* Hughes (1871), L. R. 6 C. P. 78; 40 L. J. C. P. 104. And see Learoyd *v.* Brook, [1891] 1 Q. B. 431; 60 L. J. Q. B. 373.

(*f*) (1885), 28 Ch. D. 409; 54 L. J. Ch. 478.

(*g*) *Ex parte* Prankerd (1819), 3 B. & Ald. 257; *Ex parte* Bayley (1829), 9 B. & C. 691; 8 L. J. K. B. 13; *Re* Thompson (1848), 1 Ex. 864.

(*h*) See Partnership Act, 1890, s. 40; and Atwood *v.* Maude (1868), L. R. 3 Ch. 369; 16 W. R. 665; Belfield *v.* Bourne, [1894] 1 Ch. 521; 63 L. J. Ch. 104; Featherstonhaugh *v.* Turner (1858), 25 Beav. 382; 28 L. J. Ch. 812; Lee *v.* Page (1861), 30 L. J. Ch. 857; 7 Jur. N. S. 768; and Rooke *v.* Nisbet (1881), 50 L. J. Ch. 588.

goods, and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void (*i*), has in some cases been treated as founded on the want of consideration for the purchaser's agreement to pay the price (*k*). have ceased to exist.

The subject of impossible contracts is treated of under Taylor *v.* Caldwell, *post*, p. 225.

Past Consideration to support Promise must be moved by previous Request.

LAMPLEIGH *v.* BRATHWAIT. (1616) [40]

[Hob. 105; Moore, 866.]

Brathwait, having committed a murder, requested Lampleigh to take certain journeys and use all his influence with a view to a pardon. After the journeys had been taken, and the services rendered, Brathwait promised, as a mark of his gratitude, to give his friend £100. It was held that this promise was binding, notwithstanding that it had been made in consideration of services rendered in the past. The defendant *had requested* plaintiff to do what he had done, and therefore his doing it could not be looked upon as a mere voluntary courtesy.

Past consideration.

Services rendered in the past, however great, are not generally a sufficient consideration to support a promise. If a plaintiff, suing on a warranty, were to say in his statement of claim that "in consideration that he (the plaintiff) *had bought* a horse of the defendant, the defendant promised that it was sound," such a pleading would disclose no cause of action, as no sufficient consideration would appear for the defendant's alleged promise (*l*).

But a past consideration will support a promise when it consists of services rendered by the plaintiff *at the defendant's request.*

(*i*) Sect. 6 of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71).

(*k*) But see Benj. on Sale, pp. 81, 82 (4th ed.).

(*l*) Roscorla *v.* Thomas (1842), 3 Q. B. 234; 2 Q. & D. 508.

Request.

This request (Brathwait's for instance) is generally *express;* the promisor has actually asked the promisee to do the service. But sometimes the law has to *imply the request, e.g.* :—

Compulsion of promisee.

1. *Where the plaintiff has been compelled to do what the defendant was legally bound to do.*

Not content with presuming that the defendant *requested* the plaintiff to settle for him, the law here goes on to presume that, in consideration of that settlement, the defendant *promised* the plaintiff to indemnify him. Both request and promise are implied. *The acceptor of a bill of exchange* must pay it when due; he is primarily liable on it. If he does not pay it, the holder may sue one of the indorsers and make *him* pay it. In such a case the law presumes that the acceptor asked the indorser to pay it, and presumes further that the acceptor subsequently promised to reimburse him (*m*). And whenever *a surety* is called on to pay his principal's debt, the law presumes (1) that the principal asked him to pay it, and (2) that he went on to promise indemnification. So, too, in a case where the plaintiff, a carrier, having by mistake delivered some goods to the defendant, who wrongfully appropriated them, was obliged to pay damages to the proper consignee, it was held that he could recover the amount against the appropriator (*n*). The receipt of the goods by the defendant must be considered to have been equivalent to his saying, "If you (the carrier) pay the true owner (as you may be compelled to do) for the goods, I will reimburse you" (*o*).

As to when a surety is justified in resisting payment on behalf of the debtor, the question seems to be, *What would a reasonable man have done under similar circumstances in a cause entirely his own?* Would he have defended the action or not? (*p*). "No person," said Lord Denman once, "has a right to inflame his own account against another by incurring additional expense in the uprighteous resistance to an action he cannot defend" (*q*).

A distinction is to be observed between compulsion by law and compulsion by agreement. If it was merely by agreement that the defendant was bound to do what the plaintiff has been compelled to do, the plaintiff must sue him on the special agreement, and not on implied *assumpsit.* Thus, in one case a tenant by written agreement engaged to pay certain taxes which by statute were due from

(*m*) Pownal *v.* Ferrand (1827), 6 B. & C. 439; 9 D. & R. 603; Edmunds *v.* Wallingford (1885), 14 Q. B. D. 811; 54 L. J. Q. B. 305.

(*n*) Brown *v.* Hodgson (1811), 4 Taunt. 189; 2 Camp. 36.

(*o*) See *per cur.* in Spencer *v.* Parry, *infra.*

(*p*) Tindall *v.* Bell (1843), 11 M. & W. 228; 12 L. J. Ex. 161.

(*q*) Short *v.* Kalloway (1839), 11 A. & E. 28.

the landlord. The tenant made default, and the landlord being obliged to pay, sued him for the amount as money paid to his use. But, as was pointed out by the Court, the plaintiff's payment had relieved the defendant from no liability but what arose from the contract between them. The taxes remained due by the default of the defendant, and this would give the plaintiff a remedy on the agreement, but the amount was paid by the plaintiff to one who had no claim upon the defendant, and therefore not to his use (*r*).

Kindness of promisee.

2. *Where the promisee has voluntarily done what the promisor was legally compellable to do, and the latter in consideration thereof expressly promises.*

Jones owes his tailor £50, and Brown pays it for him, whereupon Jones promises to repay him the money. Here, it must be noticed, it is only the request that is implied (*s*).

Promisor taking benefit.

3. *Where the promisor had adopted the benefit of the consideration.*

Here, too, both request and promise are presumed. If a tradesman sends me a quantity of things which I did not order, but have no objection to keep, the law presumes (1) that I asked him to send them, and (2) that I promised to pay for them. The maxim *omnis ratihabitio retrotrahitur et mandato priori æquiparatur* applies (*t*).

Continuing consideration.

It may be noticed here that a *continuing* consideration, that is, one *executed in part, but which still continues*, may also be sufficient to support a promise; *e.g.*, where the defendant, having become a tenant of the plaintiff, promised the plaintiff that he would, during the term of his tenancy, manage the farm demised to him in a husbandlike manner (*u*).

(*r*) Spencer *v.* Parry (1835), 3 A. & E. 331; 4 N. & M. 771.

(*s*) Wing *v.* Mill (1817), 1 B. & Ald. 104; Paynter *v.* Williams (1833), 1 C. & M. 810; 3 Tyr. 894.

(*t*) Bird *v.* Brown (1850), 4 Ex. 798; 19 L. J. Ex. 154; Eastwood *v.* Kenyon (1840), 11 A. & E. 438; 3 P. & D. 276. See also *Ex parte* Ford (1885), 16 Q. B. D. 305; 55 L. J. Q. B. 406.

(*u*) Powley *v.* Walker (1793), 5 T. R. 373; 2 R. R. 619; and Massey *v.* Goodall (1851), 17 Q. B. 310; 20 L. J. Q. B. 526.

Moral Consideration Insufficient.

[41] BEAUMONT *v.* REEVE. (1846)

[8 Q. B. 483; 15 L. J. Q. B. 141.]

In consideration of cohabitation during the *preceding* five years, a man promised to pay his late mistress an annuity of 60*l.* a year. In an action brought for arrears, it was held that there was *no legal consideration* for the promise.

Contract not illegal.

It should be noticed that it was *not* because the contract was *illegal* that it was held to be void, but simply because there was *no consideration* for Reeve's promise; so that if the contract had been under seal (when consideration is unnecessary) it would have been binding on him. *Future* cohabitation, however, would be an *illegal* consideration, and would vitiate even a contract under seal (*x*).

Moral consideration when sufficient.

But though a merely moral obligation will *not* support a promise, a moral obligation which *was once a legal one*, and would be so still but for the intervention of some statute or positive rule of law, *will* (*y*). A promise, for instance, to pay a debt barred by the Statute of Limitations is binding. A bankrupt, however, who has obtained his discharge cannot, except on a new consideration (*z*), make a binding promise to pay debts from which the Bankruptcy Acts have released him.

Father's liability.

A parent, it may be mentioned, is not under any obligation, other than moral, to pay debts incurred by his child (*a*). Very slight circumstances, however, will raise a presumption of authority. "People are very apt to imagine," said Maule, J., once (*b*), "that a son stands in this respect upon the same footing as a wife.

(*x*) See Pearce *v.* Brooks, *post*, p. 186; and *Re* Vallance, Vallance *v.* Blagden (1884), 26 Ch. D. 353; 50 L. T. 574.

(*y*) See note to Wennall *v.* Adney (1802), 3 B. & P. 249; 6 R. R. 780.

(*z*) Jakeman *v.* Cook (1878), 4 Ex. Div. 26; 48 L. J. Ex. 165; distinguishing Heather *v.* Webb (1876), 2 C. P. D. 1; 46 L. J. C. P. 89. See also *Ex parte* Barrow (1881), 18 Ch. D. 464; 50 L. J. Ch. 821.

(*a*) Mortimore *v.* Wright (1840), 6 M. & W. 482; 9 L. J. (N. S.) Ex. 158.

(*b*) Shelton *v.* Springett (1851), 11 C. B. 452.

But this is not so. If it be asked, 'Is, then, the son to be left to starve?' the answer is, he must apply to the parish, and they will compel the father, if of ability, to pay for his son's support" (*c*). A wife, however, may be authorized by her position to bind her husband to pay for necessaries supplied to the children committed to her charge (*d*).

Barristers.

A barrister's services as an advocate are supposed to be honorary, and therefore he can neither bring an action for his fees, nor make an express contract with his client in respect of them (*e*). But an express contract will be good when the strict relation of counsel and client does not exist between the contracting parties, *e.g.*, when a barrister acts as arbitrator or returning officer (*f*); and possibly an express contract with a client as to non-litigious business would be upheld.

Conveyancers and special pleaders may sue for their fees.

Medical practitioners.

Medical practitioners may recover their fees, provided they prove upon the trial that they are registered (*g*). Their rights and duties are governed by the Medical Act, 1886 (49 & 50 Vict. c. 48), the Medical Act, 1858 (21 & 22 Vict. c. 90), and the Apothecaries Act, 1815 (55 Geo. III. c. 194). A registered practitioner cannot recover for the services of an unregistered assistant (*h*). The General Council of Medical Education have power to strike a practitioner off the register, and if they do so *bonâ fide* and after due inquiry, there is no appeal (*i*).

Dentists, chemists, veterinary surgeons.

The law regarding persons practising dentistry is contained in the Dentists Act, 1878 (41 & 42 Vict. c. 33). As to chemists and druggists, see the Pharmacy Act, 1868 (31 & 32 Vict. c. 121); and as to veterinary surgeons, see the Veterinary Surgeons Act, 1881 (44 & 45 Vict. c. 62).

(*c*) 43 Eliz. c. 2, s. 7; Maund *v.* Mason (1874), L. R. 9 Q. B. 254; 43 L. J. M. 62; and see 33 & 34 Vict. c. 93, ss. 13, 14; and Coleman *v.* Birmingham (1881), 6 Q. B. D. 615; 50 L. J. M. 92.

(*d*) Bazeley *v.* Forder (1868), L. R. 3 Q. B. 559; 37 L. J. Q. B. 237.

(*e*) Kennedy *v.* Brown (1863), 13 C. B. N. S. 677; 32 L. J. C. P. 137; Robertson *v.* Macdonough (1880), 14 Cox, C. C. 469; Swinfen *v.* Chelmsford (1860), 5 H. & N. 890; 29 L. J. Ex. 382; *Re* Le Brasseur and Oakley, [1896] 2 Ch. 487; 65 L. J. Ch. 763.

(*f*) Egan *v.* Kensington Union (1841), 3 Q. B. 935, n.

(*g*) But as to a medical man's right to recover fees for work done in connection with a public hospital, see the recent case of Horner *v.* Lewis (1898), 67 L. J. Q. B. 524; 78 L. T. 792.

(*h*) Howarth *v.* Brearley (1887), 19 Q. B. D. 303; 56 L. J. Q. B. 543; Davies *v.* Makuna (1885), 29 Ch. D. 596; 54 L. J. Ch. 1148.

(*i*) Allbutt *v.* General Council of Medical Education (1889), 23 Q. B. D. 400; 58 L. J. Q. B. 606.

REALITY OF CONSENT.

Recovery of Money Paid under Mistake, &c.

[42] MARRIOTT *v.* HAMPTON. (1797)

[7 T. R. 269; 2 Esp. 546.]

Hampton sold goods to Marriott. These Marriott duly paid for and obtained a receipt. By-and-by Hampton sent in his bill again. Marriott had a distinct recollection of having paid for the goods, and said so. Hampton, however, challenged him to show a receipt, and though Marriott looked high and low for the document, it could not be found, and, as Hampton brought an action, he was obliged to pay over again.

But after a while the missing receipt was found, and Marriott now went to law with the tradesman to force him to repay the money. The reader will be grieved to hear that his efforts were not crowned with the success they deserved. Lawyers must live, of course; but *interest reipublicæ ut sit finis litium*, and there would be no end to litigation if everybody could have their cases tried over again when fresh evidence came to light.

Ignorantia facti excusat.

Money paid under a MISTAKE OF MATERIAL FACTS, and which the party receiving it has no claim in conscience to retain, is recoverable as money paid without consideration. *Ignorantia facti excusat.*

Two persons once agreed to dissolve partnership, and one of them paid to the other a sum of money for his share, on the footing of an investigation he had made of the partnership accounts. He afterwards discovered that the profits were not so great as he had supposed them to be, so that he had paid too much for the share. This being a mistake of fact, it was held that, in spite of his carelessness in not having sufficiently looked into the matter, he could recover the sum paid in excess (*a*). It may be stated as a *general rule*, that a person who receives money paid under a mistake of fact must not, *through the mistake or misconduct of the payer*, be placed in a worse position than if it had not been paid (*b*). But where there has been no neglect or misconduct on the plaintiff's part, the mere fact that the defendant cannot be restored to the *status quo*, for instance, when he has "applied the money in the meantime to some purchase which he otherwise would not have made," is no defence (*c*). In Durrant *v.* Ecclesiastical Commissioners (*d*) it appeared that a man in Norfolk had by mistake paid to the Ecclesiastical Commissioners, who were owners of the tithes of the parish, tithe rent-charge in respect of lands not in his occupation. He did not discover his mistake till the two years limited by 6 & 7 Will. IV. c. 71, for the recovery of a tithe rent-charge had expired, and the Ecclesiastical Commissioners had consequently lost their remedy for the arrears against the lands actually chargeable. It was held, however, in an action brought by this man against the Commissioners, that he was not bound to find out his mistake within any particular time, and that, having found it out, he could recover the money. Moreover, money paid in *bonâ fide* forgetfulness of a fact once known to the plaintiff, under a "blind

Restitutio in integrum.

(*a*) Townsend *v.* Crowdy (1860), 8 C. B. N. S. 477; 29 L. J. C. P. 300; Milnes *v.* Duncan (1827), 6 B. & C. 671; 9 D. & R. 731; and Lucas *v.* Worswick (1833), 1 M. & Rob. 293; 42 R. R. 798.

(*b*) Cocks *v.* Masterman (1829), 9 B. & C. 902; 4 M. & R. 676. See also Clarke *v.* Dickson (1858), E. B. & E. 148; 27 L. J. Q. B. 223; Freeman *v.* Jeffries (1869), L. R. 4 Ex. 189; 38 L. J. Ex. 116; and London and River Plate Bank *v.* Bank of Liverpool, [1896] 1 Q. B. 7; 65 L. J. Q. B. 80.

(*c*) See Standish *v.* Ross (1849), 3 Ex. 527; 19 L. J. Ex. 185; and Colonial Bank *v.* Exchange Bank (1885), 11 App. Cas. 84; 55 L. J. P. C. 14.

(*d*) (1880), 6 Q. B. D. 234; 50 L. J. Q. B. 30; distinguishing Cocks *v.* Masterman (1829), 9 B. & C. 902; 4 M. & R. 676. There is, however, some mistake in the report of this case, for the Tithe Act, 6 & 7 Will. IV. c. 71, did not limit *the time* within which tithe rent charge might be recovered, but limited *the amount* recoverable to two years' arrears. See sects. 81 and 82. The Tithe Act of 1891, 54 Vict. c. 8, s. 10 (2), however, limits to two years the time within which proceedings must be commenced to recover tithe rent-charge which first becomes payable subsequent to 26th March, 1891.

suspicion" of the facts, or in the hurry of business, can be got back (*e*).

Chambers *v.* Miller.

It is not, however, every seeming mistake of fact which will enable a party to recover money paid in ignorance. Where, for instance, bankers cash a customer's cheque, and then discover that they have no assets of his, they cannot recover the money back from the person to whom they have paid it (*f*). In such a case the bankers by a very moderate amount of inquiry might have ascertained that the cheque presented to them ought not to be honoured, and therefore there was really no mistake. "All the facts," said Williams, J., "are precisely as the cashier apprehended them. There is no mistake. It may be that if the cashier had at the time been aware of the state of the customer's account, he would not have paid the cheque. But if we were to go into all the remote considerations by which parties may be influenced, it would be opening a very wide field of conjecture, and would lead to infinite confusion and annoyance."

Mutual mistake.

A contract based on a misapprehension of facts *by both parties* is void, and money paid under it may be recovered (*g*). Thus, where a contract for the sale of a life policy was entered into by both parties in the belief that the assured was alive, whereas he was in fact then dead, it was recently held (*h*) that the vendors were entitled to have the transaction set aside notwithstanding that it had been completed by assignment. Reference should also be made to the recent case of Van Praagh *v.* Everidge (*i*), where a person bid for one lot at an auction sale in mistake for another.

Mistake as to person one is dealing with.

A *mistake as to the person with whom he is dealing* will sometimes relieve a party from the necessity of performing his contract. Jones, who had been in the habit of dealing with Brocklehurst, a pipe-hose manufacturer, sent him an order for 50 feet of leather hose. It happened that that very day Brocklehurst had been bought out by his foreman, Boulton, who executed the order and sent the goods to Jones, without giving him notice that the goods were supplied by him and not by Brocklehurst. It was held that

(*e*) Kelly *v.* Solari (1841), 9 M. & W. 54; 6 Jur. 107; approved in Imperial Bank of Canada *v.* Bank of Hamilton, [1903] A. C. 49; 72 L. J. P. C. 1. See, however, Barrow *v.* Isaacs, [1891] 1 Q. B. 417; 60 L. J. Q. B. 179.

(*f*) Chambers *v.* Miller (1862), 13 C. B. N. S. 125; 32 L. J. C. P. 301; Aiken *v.* Short (1856), 1 H. & N. 210; 35 L. J. Ex. 321; and see Pollard *v.* Bank of England (1871), L. R. 6 Q. B. 623; 40 L. J. Q. B. 233.

(*g*) Cochrane *v.* Willis (1865), L. R. 1 Ch. 58; 35 L. J. Ch. 36.

(*h*) Scott *v.* Coulson, [1903] 2 Ch. 249; 72 L. J. Ch. 600.

(*i*) [1903] 1 Ch. 434; 72 L. J. Ch. 260.

Boulton could not maintain an action against Jones for the price (*k*).

Relief in equity.

The grounds for *equitable relief* in the case of mistakes of fact are "that mistake or ignorance of facts in parties is a proper subject of relief only where it either constitutes a material ingredient in the contract of the parties, or disappoints their intention by a mutual error; or where it is inconsistent with good faith, and proceeds from a violation of the obligations which are imposed by law upon the conscience of either party. But where each party is equally innocent, and there is no concealment of facts which the other party has a right to know, and no surprise or imposition exists, the mistake or ignorance, whether mutual or unilateral, is treated as laying no foundation for equitable interference" (*l*).

Ignorantia juris non excusat.

Money paid with a knowledge of all the facts but under a MISTAKE OF THE LAW, *i.e.*, of a general rule of law, or, like Mr. Marriott, by compulsion of legal proceedings, cannot, in general, be recovered back, there being nothing against conscience in the other retaining it. *Ignorantia juris non excusat.* A ship captain brought home in his ship a quantity of treasure, and, when he got to England, paid over a certain portion of it to the admiral under whose convoy he had sailed; not, if you please, in a spirit of gratitude, but *believing that he was bound by law to pay it.* But he wasn't; and when he found that out, he brought an action to try to get it back again. But it was held that he could not get it back again, for he had gone wrong in his *law*, not in his facts (*m*).

Tipping the Admiral.

Everybody knows the law.

"*Every man*," said Lord Ellenborough, in Bilbie *v.* Lumley (*n*) (where an underwriter tried to get back some money he had paid as for a loss, saying he had not understood the legal effect of a particular document), "*must be taken to be cognisant of the law; otherwise there is no saying to what extent the excuse of ignorance might not be carried. It would be urged in almost every case.*"

(*k*) Boulton *v.* Jones (1857), 2 H. & N. 564; 27 L. J. Ex. 1117; followed in the American case of Boston Ice Company *v.* Potter (1877), 123 Mass. 28; see also Mitchell *v.* Lapage (1816), Holt, N. P. 253; 17 R. R. 634; Humble *v.* Hunter (1848), 12 Q. B. 310; 17 L. J. Q. B. 350; Smith *v.* Wheatcroft (1878), 9 Ch. D. 223; 47 L. J. Ch. 745; and the important recent case of Gordon *v.* Street, [1899] 2 Q. B. 641; 69 L. J. Q. B. 45; where a fraudulent concealment of his identity by an unscrupulous money-lender, who carried on his business under various assumed names, was held to disentitle him to enforce a contract against an unsuspecting borrower.

(*l*) Snell's Equity, p. 456 (13th ed.).

(*m*) Brisbane *v.* Dacres (1813), 5 Taunt. 143; 14 R. R. 718; and see Barber *v.* Pott (1859), 4 H. & N. 759; 28 L. J. Ex. 381; and Rogers *v.* Ingham (1876), 3 Ch. Div. 351; 46 L. J. Ch. 322.

(*n*) (1802), 2 East, 469; 6 R. R. 479.

In Miles *v.* Scotting(*o*), it was held by Stephen, J., that the doctrine that money paid under a mistake cannot be recovered back unless the mistake be one of fact, applies even though the person receiving the payment be one of the persons authorizing it to be made.

Moore *v.* Fulham Vestry.

The case of Moore *v.* Fulham Vestry (*p*) contains an important decision on this subject. The facts were, that the defendants had issued a summons against the plaintiff to recover his proportion of certain street improvement expenses alleged to be due from him as the owner of premises abutting on a street in the defendants' district; the plaintiff paid the money *before the summons was heard*, and the summons was withdrawn. The plaintiff having subsequently discovered that his premises did not abut on the street in question, sued the defendants for a return of the money; but it was held that the money had been paid under pressure of legal process, and that, notwithstanding the withdrawal of the summons, it was not recoverable. "The principle of law is," said Lord Halsbury, "*not* that money paid under a *judgment, but* that money paid under the *pressure of legal process* cannot be recovered."

Abuse of legal process.

It is to be observed, however, that to make money paid under compulsion of legal proceedings irrecoverable, the proceedings must be regular, and not a mere cloak for extortion. A person named Collins, who was quite insolvent, had the impudence to arrest a continental duke for an imaginary debt of £10,000. The continental duke was incontinently frightened—probably he had heard that debtors in England were always ordered off to instant execution—and paid £500 for his release. He afterwards brought an action to recover the money, and was held entitled to do so (*q*). "It is clear," said Coleridge, J., "that, if money be paid with full knowledge of facts, it cannot be recovered back. It is clear, too, that if there be a *bonâ fide* legal process, under which money is recovered, although not actually due, it cannot be recovered back, inasmuch as there must be some end to litigation. That is the substance of the decisions. But no case has decided that, *when a fraudulent use has been made of legal process*, both parties knowing throughout that the money claimed was not due, the party paying under such process is not to have the assistance of the law."

And the recent case of Ward *v.* Wallis (*r*) is to the same effect.

(*o*) (1885), 1 C. & E. 491.

(*p*) [1895] 1 Q. B. 399; 64 L. J. Q. B. 226.

(*q*) Cadaval *v.* Collins (1836), 4 A. & E. 858; 2 H. & W. 54.

(*r*) [1900] 1 Q. B. 675; 69 L. J. Q. B. 423.

There the plaintiff had sued the defendant for work and labour, by mistake giving credit on the writ for payment of £75 on account, and claiming the balance. The defendant, knowing that the credit was given by mistake, paid the balance, and took a receipt for the whole sum due from him. The plaintiff, on discovering the mistake, brought this action to recover the £75 as money had and received to his use. It was held that the general rule as to money paid under compulsion of law would have applied, but that the want of *bona fides* on the part of the defendant prevented the application of that rule. "It seems to me to appear from the notes to Marriott *v.* Hampton," said Kennedy, J., "that there must be *bona fides* on the part of the party who has got the benefit of his opponent's payment in order to bring the principle laid down in that case into force, and that, if the person enforcing a payment under legal process has therein taken an unfair advantage or acted unconscientiously, knowing that he had no right to the money, the principle laid down in Marriott *v.* Hampton may not prevent the defendant from recovering the money back."

Money obtained by extortion.

The Courts have in numerous cases held that money obtained by some form of coercion, or extortion was recoverable back, such extortion presumably rendering it *contra æquum et bonum* that the defendant should retain it. Thus, in Ashmole *v.* Wainwright(*s*), it was held that an action for "money had and received" lay against a carrier, who had refused to deliver goods without payment of an exorbitant charge, to recover back the surplus. Another good illustration is to be found in the case of Green *v.* Duckett(*t*). The plaintiff's bull had trespassed on the defendant's land and done some trifling damage, and had been distrained *damage feasant* by the defendant, who impounded it. The plaintiff demanded back his bull, and tendered eighteen-pence as compensation for the damage; but the defendant refused to deliver up the bull unless he was paid £2, and the plaintiff accordingly paid this sum under protest, and brought an action for the difference—£1 18*s.* 6*d.* The Court, having found that eighteen-pence was sufficient to cover the damage done by the bull, held that the plaintiff was entitled to recover the surplus as money had and received. And there is no doubt that money extorted by duress of goods, detainer of deeds, or, in the words of Lord Mansfield(*u*), "by any undue advantage taken of the party's situation contrary to laws made for the pro-

Duress of goods.

(*s*) (1842), 2 Q. B. 837; 11 L. J. Q. B. 79; followed in Green *v.* Duckett, *infra*.

(*t*) (1883), 11 Q. B. D. 275; 52 L. J. Q. B. 435.

(*u*) Moses *v.* Macfarlan (1760), 2 Burr. 1005; 1 W. Bl. 219.

tection of persons under those circumstances," can be recovered back in an action for money had and received. Thus, in Wakefield *v.* Newton (*x*), it was held that money paid under protest by a mortgagor, in order to obtain possession of his title deeds, withheld by the mortgagee's attorney upon an unfounded claim of lien, might be recovered back from the attorney as money had and received. So, too, in Parker *v.* G. W. Ry. Co. (*y*), the defendants insisted upon a larger sum for the carriage of the plaintiff's goods than they were authorized to take under their Act. The plaintiff, in order to have his goods carried, paid the excess under protest, and sued for its recovery. The Court held the action maintainable, on the broad ground that the payments "were made in order to induce the company to do that which they were bound to do without them."

Title deeds.

Over-charge by carriers, &c.

As to money obtained by duress of *person*, see *ante*, p. 26.

So, resting on the ground of a presumption that there must have been fraud or undue influence of some kind, there is a well-known doctrine of equity that if a person, acting in ignorance of *a clear and elementary principle of law*, parts with a portion of his property, he will be relieved from the consequences of his mistake. Thus, in Landsdowne *v.* Landsdowne (*z*), an uncle having a difference of opinion with the son of his elder brother as to the right to inherit an estate, they both agreed to go by the decision of the *schoolmaster*. That worthy person pronounced in favour of the uncle; but it was held that, the mistake being so great as to suggest fraud, the nephew was entitled to relief. Where, however, the mistake arises on a doubtful point of law, a fair compromise will be upheld; and it is on this ground that the whole doctrine of the validity of family compromises of doubtful rights rests. But in such cases there must be a full communication of all the material circumstances known (*a*).

Landsdowne *v.* Landsdowne.

(*x*) (1844), 6 Q. B. 276; 13 L. J. Q. B. 258. See also Smith *v.* Sleap (1844), 12 M. & W. 585; Gibbon *v.* Gibbon (1853), 13 C. B. 205; 22 L. J. C. P. 131; Oates *v.* Hudson (1851), 6 Exch. 346; 20 L. J. Ex. 284; and Ford *v.* Olden (1867), L. R. 3 Eq. 461; 36 L. J. Ch. 651.

(*y*) (1844), 7 M. & R. 253; 13 L. J. C. P. 105. See also Parker *v.* Bristol & Exeter Ry. Co. (1851), 6 Exch. 702; 20 L. J. Ex. 442; Valpy *v.* Manley (1845), 1 C. B. 594; 14 L. J. C. P. 204; G. W. Ry. Co. *v.* Sutton (1869), L. R. 4 H. L. 226; 38 L. J. Ex. 177; L. & N. W. Ry. Co. *v.* Evershed (1879), 3 App. Cas. 1029; 48 L. J. Q. B. 22; and British Empire Co. *v.* Somes (1860), E. B. & E. 353, 367; 8 H. L. C. 338.

(*z*) (1730), 2 Jac. & Walker, 205; 15 R. R. 225.

(*a*) Gordon *v.* Gordon (1819), 3 Swanst. at p. 463; 19 R. R. 230.

Where, however, assets have come into the hands of an officer of the Court, as, for instance, a trustee in bankruptcy or official liquidator, under a mistake of law, the Court will compel its officer to repay the money (*b*). Officers of the Court.

(*b*) See *Ex parte* James (1874), L. R. 9 Ch. 609; 43 L. J. Bk. 107; *Ex parte* Simmonds (1885), 16 Q. B. D. 308; 55 L. J. Q. B. 74; *In re* Brown (1886), 32 Ch. D. 597; 55 L. J. Ch. 556; and *In re* Opera, Limited, [1891] 2 Ch. 154; 60 L. J. Ch. 464.

LEGALITY OF OBJECT.

Contracts Contrary to Public Policy.

[43 EGERTON *v.* BROWNLOW. (1853)

[4 H. L. Cas. 1; 23 L. J. Ch. 348.]

The seventh Earl of Bridgewater was anxious that after his death some member of his family should become a duke, and with that object in view he made his will. He left large estates to Lord Alford and his heirs, but expressly provided that, if Lord Alford died without being made a duke, they should go over. Lord Alford was *not* made a duke, but it was held nevertheless that the estates did *not* go over, as the condition subsequent which the earl had imposed was contrary to public policy and void.

No true ownership of land.

No man, according to our law, is the *owner* of *land*. At the most he is *tenant* in fee simple; the *ownership* residing in the Crown, that is, in the State. As to *personal property*, the law recognises a *quasi-ownership*. In other words, it *protects* a man in the enjoyment of it. But, of course, an Act of Parliament can take away all those safeguards which are thrown round the enjoyment of property, whether real or personal; and when the interests of the State and the interests of individuals happen to clash, *public policy* (that is, "the public good recognised and protected by the most general maxims of the law and the constitution") requires that the former shall prevail.

Principle of leading case.

Egerton *v.* Brownlow is an important case on this "public policy." It was considered that the condition violated it because it would be "mischievous to the community at large that every branch of the public service should be besieged by persons who at

the peril of losing their estates were making every effort to obtain offices for which they might be unfit, and to procure titles and distinctions of which they might be unworthy," and because the common law hates capricious conditions.

Maxims.

It is to be observed that, in dealing with cases of this kind, the Courts are not distributing a kind of equity differing with the length of each judge's foot, but are acting on certain well-known principles and maxims, such as *Salus populi suprema lex*, *Nihil quod est inconveniens est licitum*, *Sic utere tuo ut alienum non lædas*, &c. The tendency of modern decisions is, however, to limit the sphere within which the Courts will set aside contracts on the ground that they contravene public policy, for, as was said by Sir George Jessel in the case of Printing Co. *v.* Sampson (*a*), "You have this paramount public policy to consider, that you are not lightly to interfere with the freedom of contract." And in the case of Tullis *v.* Jacson (*b*), it was held that a clause in a building contract, providing that the valuations, certificates, orders, and awards of the arbitrator appointed thereunder should be final and binding, and should not be set aside for any pretence, charge, suggestion, or insinuation of fraud, collusion, or confederacy, was not obnoxious to public policy, for, in the absence of fraud on the part of the parties to the contract, it was competent to them to agree not to raise any question of fraud in the arbitrator.

Tullis *v.* Jacson.

"Public policy," once said Burroughs, J., "is a restive horse, and when once you get astride of it there is no knowing where it will carry you."

"You vote for my man, and I'll vote for yours."

In the case of Bolton *v.* Madden (*c*), the plaintiff and defendant were both subscribers to a certain charity, the objects of which were elected by the subscribers with votes proportioned to the amount subscribed. The defendant on one occasion was anxious that a particular person should be elected; so, to compass his object, he agreed with the plaintiff that, *if the latter would give twenty-eight votes for the candidate at this election, he (the defendant) would at the next election give twenty-eight votes for anybody the plaintiff wished.* Accordingly, the plaintiff voted for the defendant's candidate; but, when the next election came round, the defendant refused to furnish the twenty-eight votes he had promised, and the plaintiff in consequence subscribed £7 7*s.* to the charity so as to obtain twenty-eight more votes in his own right. In an action for the money thus paid, it was urged by the defendant that the agreement

(*a*) (1875), L. R. 19 Eq. 462; 44 L. J. Ch. 705.
(*b*) [1892] 3 Ch. 441; 61 L. J. Ch. 655.
(*c*) (1873), L. R. 9 Q. B. 55; 43 L. J. Q. B. 35.

was void as against public policy. "The argument for the defendant," said Blackburn, J., "was that the subscriber to a charity is under an obligation to give his votes for the best object, and that the plaintiff, if he gave his votes at the first election to what he thought the best candidate, incurred neither trouble nor prejudice, so that there was in that point of view no consideration; and if he gave his votes to the candidate whom he did not think the best, the whole agreement was void as against public policy. But though some of us, at least, much disapprove of this kind of traffic, we can find no legal principle to justify us in holding that the subscriber to a charity may not give his votes as he pleases, answering only to his own conscience and reputation for the way he exercises his power."

Bribery.

But any agreement involving bribery or undue influence at the election of Members of Parliament, or at an election of an officer of a municipal corporation, or of any officer to be chosen by public election is illegal and void: as a promise to a voter to pay his travelling expenses (*d*), or to pay him for loss of time (*e*), or a wager with a voter upon the result of an election (*f*). Another illustration is to be found in the case of Coppock *v.* Bower (*g*); there, a petition having been presented to the House of Commons against the return of a member on the ground of bribery, the petitioner entered into an agreement, in consideration of a sum of money, and upon other terms, to proceed no further with the petition. This agreement was held to be illegal. These matters are for the most part defined by statute and visited with penalties (*h*).

Maintenance.

The subjects of *champerty* and *maintenance* also come under the head of agreements void on the ground of public policy. "Maintenance" is really a general term of which "champerty" is a species.

Rules as to champerty.

The rules which have been established by the cases on the subject of champerty are stated as follows by Sir Frederick Pollock in his "Principles of Contract" (*i*):—

(*a*) An agreement to advance funds or supply evidence with or without professional assistance (or, it seems, professional assistance only) (*k*) for the recovery of property in con-

(*d*) Cooper *v.* Slade (1858), 6 H. L. C. 746; 27 L. J. Q. B. 449.

(*e*) Simpson *v.* Yeend (1869), L. R. 4 Q. B. 626; 38 L. J. Q. B. 313.

(*f*) Allen *v.* Hearn (1785), 1 T. R. 56; 1 R. R. 149.

(*g*) (1838), 4 M. & W. 361; 8 L. J. Ex. 9.

(*h*) The Corrupt Practices Prevention Act, 1854 (17 & 18 Vict. c. 102); the Corrupt Practices (Municipal Elections) Act, 1872 (35 & 36 Vict. c. 60); the Illegal and Corrupt Practices Prevention Act, 1883 (46 & 47 Vict. c. 51). See Reg. *v.* Hall, [1891] 1 Q. B. 747; 60 L. J. M. C. 124.

(*i*) Pp. 337 *et seq.* (7th ed.).

(*k*) Per Jessel, M. R., *Re* Attorneys and Solicitors Act (1875), 1 Ch.

sideration of a remuneration contingent on success, and proportional to or to be paid out of the property recovered, is void (*l*).

(β) A solicitor cannot purchase the subject-matter of a pending suit from his client in that suit (*m*); but he may take a security upon it for advances already made and costs already due in the suit (*n*).

(γ) Except in the case last mentioned, the purchase of property the title to which is disputed, or which is the subject of a pending suit, or an agreement for such purchase, is not in itself unlawful (*o*); but such an agreement is unlawful and void if the real object of it is only to enable the purchaser to maintain the suit (*p*).

Rees *v.* De Bernardy.

The recent case of Rees *v.* De Bernardy (*q*) should be referred to on this subject. It was there held that a contract by a person to communicate information on the terms of getting a share of the property thereby recovered by the person to whom the information was given is not void for champerty; but if the contract is not merely that information shall be given, but also that the person who gives it and who is to share in what may be recovered, shall himself recover the property or actively assist in the recovery of it, the contract is void.

What amounts to maintenance.

As to maintenance in general, it may be said that it cannot arise unless there is "something against good policy and justice, something tending to promote unnecessary litigation, something that in a legal sense is immoral, and to the constitution of which a bad motive in the same sense is necessary" (*r*). Therefore,

D. 573; 44 L. J. Ch. 47. And see Grell *v.* Levy (1864), 16 C. B. N. S. 73; 10 Jur. N. S. 210; and Strange *v.* Brennan (1846), 15 Sim. 346; 15 L. J. Ch. 389.

(*l*) Stanley *v.* Jones (1831), 7 Bing. 369; 9 L. J. C. P. 51; Reynell *v.* Sprye (1852), 1 D. M. G. 660; 21 L. J. Ch. 633; Sprye *v.* Porter (1852), 7 E. & B. 58; 26 L. J. Q. B. 64; Hutley *v.* Hutley (1873), L. R. 8 Q. B. 112; 42 L. J. Q. B. 52.

(*m*) Wood *v.* Downes (1811), 18 Ves. 120; 11 R. R. 160; Simpson *v.* Lamb (1857), 7 E. & B. 84; 20 L. J. Q. B. 121.

(*n*) Anderson *v.* Radcliffe (1858), E. B. & E. 806; 29 L. J. Q. B. 128.

(*o*) Hunter *v.* Daniel (1845), 4 Ha. 420; 14 L. J. Ch. 194; Knight *v.* Bowyer (1858), 2 De G. & J. 421, 444; 27 L. J. Ch. 521.

(*p*) Prosser *v.* Edmonds (1835), 1 Y. & C. Ex. 481; 41 R. R. 322; Harrington *v.* Long (1833), 2 My. & K. 590; 39 R. R. 304; De Hoghton *v.* Money (1866), L. R. 2 Ch. 164; Seear *v.* Lawson (1880), 15 Ch. D. 426; 49 L. J. Bk. 69, where the precise extent of the doctrine is treated as doubtful; Guy *v.* Churchill (1888), 40 Ch. D. 481; 56 L. J. Ch. 670.

(*q*) [1896] 2 Ch. 437; 65 L. J. Ch. 656.

(*r*) Fischer *v.* Kamala Naicker (1860), 8 Moo. Ind. App. 170, 187. This case was decided on the law

for example, a transaction cannot be bad for maintenance whose object is to enable a principal or other person really interested to assert his rights in his own name (*r*). Nor is it maintenance for several persons to agree to prosecute or defend a suit in the result of which they have, or reasonably believe they have, a *common interest* (*s*). As to what amounts to a "common interest" sufficient to justify maintenance, reference should be made to the case of Alabaster *v.* Harness (*t*), as well as to the important judgment of Lord Coleridge in Bradlaugh *v.* Newdegate (*u*). It was recently held, that where a master and his servant are both liable to an action for libel in respect of matter published by the servant in the master's newspaper, and the action is brought against the servant only, the master is entitled to undertake the defence of the servant (*x*). So, too, *charity* is a sufficient excuse for maintaining a stranger's action even without any inquiry into the merits of the case (*y*).

Common interest.

Charity.

It has been held (*z*), that the doctrine as to maintenance of civil suits is not applicable to criminal proceedings.

Another class of agreements which are void on the ground of public policy is the assignment of the pay or salary of a *public* officer. As to the law on this subject, reference should be made to the judgment of Cave, J., in the case of *In re* Mirams (*a*).

Sale of public offices.

Parents cannot by any agreement deprive themselves of the right of custody and control over their children which is vested in them by law; and it has recently been held (*b*) that the mother of an illegitimate child is in the same position in this respect. A provision in a deed of separation depriving the father of the custody of his children was, except in the case of gross misconduct (*c*), illegal (*d*). But this was altered by the Custody of Infants Act,

Custody of children.

of British India, but it fairly represents the principles on which the English Courts now act.

(*r*) See previous note.

(*s*) Finden *v.* Parker (1843), 11 M. & W. 675; 12 L. J. Ex. 444; Plating Co. *v.* Farquharson (1881), 17 Ch. Div. 49; 50 L. J. Ch. 406, which was a case of alleged contempt of Court by reason of an advertisement for subscriptions to defend a pending suit, and offering a reward for evidence.

(*t*) [1895] 1 Q. B. 339; 64 L. J. Q. B. 76. See also Savill *v.* Langman (1898), 79 L. T. 44.

(*u*) (1883), 11 Q. B. D. 1; 52 L. J. Q. B. 454.

(*x*) Breay *v.* Royal British Nurses' Association, [1897] 2 Ch. 272; 66 L. J. Ch. 587.

(*y*) Harris *v.* Brisco (1886), 17 Q. B. D. 504; 55 L. J. Q. B. 423.

(*z*) Grant *v.* Thompson (1895), 72 L. T. 264; 43 W. R. 446.

(*a*) [1891] 1 Q. B. 594; 60 L. J. Q. B. 397.

(*b*) Humphrys *v.* Polak, [1901] 2 K. B. 385; 70 L. J. K. B. 752.

(*c*) Swift *v.* Swift (1865), 4 D. F. & J. 710; 34 L. J. Ch. 394.

(*d*) Vansittart *v.* Vansittart (1858), 4 K. & J. 62; 27 L. J. Ch. 222; Hamilton *v.* Hector (1871), L. R. 6 Ch. 701; 40 L. J. Ch. 692.

1873 (*e*). Reference should also be made to the Guardianship of Infants Act, 1886 (*f*); and the Custody of Children Act, 1891 (*g*). An agreement made in consideration of marriage or after marriage depriving the father of the control of the religious instruction of the children is illegal and void; and the Court will support the right of the father without regard to such agreement (*h*). The Court in general orders children to be educated in the religion directed by the father, or, in the absence of direction, in the religion professed by the father (*i*). And a testamentary guardian who changes his religion after the testator's death from that of the father of the ward to another may be removed from his office (*k*).

Religion of children.

Illegal Contracts.

COLLINS *v.* BLANTERN. (1767) [44]

[2 WILS. 341.]

This was an action on a bond which was intended to secure to the plaintiff the repayment of a sum of £350. But the fact was that the plaintiff had advanced the money for the purpose of settling a criminal prosecution, and it was therefore successfully pleaded that *the consideration for the bond was illegal*, and, although it did not appear on the face of the deed, vitiated it.

(*e*) 36 Vict. c. 12. See *Re* Besant (1879), 11 Ch. D. 508; 48 L. J. Ch. 497; Besant *v.* Wood (1879), 12 Ch. D. 605; 48 L. J. Ch. 497; Hart *v.* Hart (1881), 18 Ch. D. 670; 50 L. J. Ch. 697.

(*f*) 49 & 50 Vict. c. 27. See *In re* G. (an infant), [1892] 1 Ch. 292; *Re* A. and B., [1897] 1 Ch. 786; 66 L. J. Ch. 592; *Re* X., [1899] 1 Ch. 526; 68 L. J. Ch. 265.

(*g*) 54 & 55 Vict. c. 3. See Reg. *v.* Nash (1883), 10 Q. B. D. 454; 52 L. J. Q. B. 442; approved in Barnardo *v.* McHugh, [1891] A. C. 388; 61 L. J. Q. B. 721.

(*h*) Agar-Ellis *v.* Lascelles (1878), 10 Ch. D. 49; 48 L. J. Ch. 1; D'Alton *v.* D'Alton (1878), 4 P. D. 87; 47 L. J. P. 59.

(*i*) *Re* Scanlan (1888), 40 Ch. D. 200; 57 L. J. Ch. 718; *Re* Newton, [1896] 1 Ch. 740; 65 L. J. Ch. 641.

(*k*) F. *v.* F., [1902] 1 Ch. 688; 71 L. J. Ch. 415.

Said Lord Chief Justice Wilmot, in memorable words: "You shall not stipulate for iniquity. All writers upon our law agree in this—no polluted hand shall touch the pure fountains of justice. Whoever is a party to an unlawful contract, if he hath once paid the money stipulated to be paid in pursuance thereof, he shall not have the help of a Court to fetch it back again; you shall not have a right of action when you come into a Court of justice in this unclean manner to recover it back. *Procul O! procul este profani!*"

Deed vitiated by illegality.

A deed is of so solemn a nature that whatever a man therein asserts he is estopped from afterwards denying. On the other hand, "the pure fountains of justice" must not be polluted; and so we get engrafted on our rule the exception that *illegality is fatal, not only to an ordinary agreement, but even to a deed.*

Several promises, some illegal, some not.

It may happen, however, that the legal part of an agreement can be separated from the illegal. This can never be the case where one of several *considerations* is illegal, because it cannot be known which of them induced the promise (*l*). But when the consideration is not illegal, and there are several promises, some of which are illegal and others not, the agreement is void only if the illegal promises are incapable of being separated from the legal. "For the general rule is," said Willes, J., "that when you cannot sever the illegal from the legal part of a covenant the contract is altogether void; but when you can sever them, whether the illegality be created by statute or by the common law, you may reject the bad part and retain the good" (*m*).

Illegal contracts may be divided into two classes:—

(1.) Those illegal by the common law.

(2.) Those illegal by statute.

Common law illegality. Statutory illegality.

Under the former head come contracts in restraint of marriage or trade, contracts impeding the administration of justice, immoral contracts, and the like. Under the latter head may be mentioned Sabbath-breaking and gaming contracts, and also contracts under

(*l*) But see Sheehy *v.* Sheehy, [1901] 1 Ir. R. 239.

(*m*) Pickering *v.* Ilfracombe Ry. Co. (1868), L. R. 3 C. P. 250; 37 L. J. C. P. 118. See also Robinson *v.* Ommanney (1883), 23 Ch. D. 285; 52 L. J. Ch. 440; *Re* Burdett (1888), 20 Q. B. D. 310; 57 L. J. Q. B. 263; *Re* Isaacson, [1895] 1 Q. B. 338; 64 L. J. Q. B. 191; Baker *v.* Hedgeeock (1888), 39 Ch. D. 520; 57 L. J. Ch. 889.

the Truck Acts (*n*). To make a contract void the statute need not use express words of prohibition; if it inflicts a penalty, it may be sufficient (*o*). If, however, the object of the statute is *not to prohibit the act done, but only to impose a penalty for the purpose of the revenue*, the contract will not be illegal (*p*). Thus, it was held in the recent case of Learoyd *v.* Bracken (*q*), that a broker who had made purchases and sales on the Stock Exchange for his principal was not prevented from recovering commission on such purchases and sales by an omission on his part to transmit to his principal any stamped contract notes in conformity with the Customs and Inland Revenue Act, 1888 (51 & 52 Vict. c. 8), sect. 17, sub-sect. 1 (*r*). It must, however, be observed that nice questions of construction may arise in determining whether the intention of a statute prescribing under penalties the mode of carrying on a particular trade according to certain rules for the protection of the revenue, or of the health or safety of the public, is merely to protect or increase the revenue or the public health or safety by enforcing the penalties against a trader who does not comply with the rules, or to render the contracts entered into by such trader in contravention of such rules illegal (*s*).

Penalty may imply prohibition.

Question of construction.

Though an agreement to stifle a public prosecution is illegal, in such cases the intention to impede the administration of justice must be clearly proved. In the case of Flower *v.* Sadler (*t*), it was held that, in order to render illegal the receipt of securities by a creditor from his debtor, where the debt has been contracted under circumstances which might render the debtor liable to criminal proceedings, it is not enough to show that the creditor was thereby induced to abstain from prosecuting.

Agreement to stifle prosecution.

In Windhill Local Board *v.* Vint (*u*), it was decided that an

(*n*) See 1 & 2 Will. IV. c. 37; and 50 & 51 Vict. c. 46. And see Lamb *v.* G. N. Ry. Co., [1891] 2 Q. B. 281; 60 L. J. Q. B. 489; Hewlett *v.* Allen, [1892] 2 Q. B. 662; 62 L. J. Q. B. 9.

(*o*) Cope *v.* Rowlands (1836), 2 Gale, 231; 2 M. & W. 149; Bensley *v.* Bignold (1822), 5 B. & Ald. 335; 24 R. R. 401; and Cundell *v.* Dawson (1847), 4 C. B. 376; 17 L. J. C. P. 311; Melliss *v.* Shirley Local Board (1885), 16 Q. B. D. 446; 54 L. J. Q. B. 408.

(*p*) Smith *v.* Mawhood (1845), 14 M. & W. 452; 15 L. J. Ex. 149; Smith *v.* Wood (1889), 24 Q. B. D. 23; 37 W. R. 800.

(*q*) [1894] 1 Q. B. 114; 63 L. J. Q. B. 96.

(*r*) But see now the Stamp Act, 1891 (54 & 55 Vict. c. 39), sects. 52, 53, which consolidates the previous statutes.

(*s*) See Johnson *v.* Hudson (1809), 11 East, 180; 10 R. R. 465.

(*t*) (1882), 10 Q. B. D. 572; 46 J. P. 503; following Ward *v.* Lloyd (1843), 7 Scott, N. R. 499; 6 Man. & G. 785; and see Rourke *v.* Mealy (1879), 41 L. T. 168; 4 L. R. Ir. 166.

(*u*) (1890), 45 Ch. D. 351; 59 L. J. Ch. 608. See also Jones *v.* Merionethshire Building Society, [1892] 1 Ch. 173; 61 L. J. Ch. 138.

agreement by the defendants at a trial to abate an indictable nuisance (the obstruction of a highway) within a certain time, in consideration of the prosecutors consenting to a verdict of Not Guilty, cannot be enforced, because it is founded on an illegal consideration.

Indemnity to bail.

So, too, an indemnity given to bail, whether by the prisoner bailed or another, is illegal, because in effect it deprives the public of the intended security for the conduct of the defendant (*x*).

Rigging the market.

Another illustration of an illegal contract is afforded by the case of Scott *v.* Brown (*y*). It was there held that an agreement between two or more persons to induce would-be buyers of shares in a company, contrary to the fact, to believe that there was a market for the shares, and that the shares were of greater value than they really were, was illegal, and that no action could be maintained in respect of such agreement or purchase of shares.

Infection.

A contract perfectly good and legal in itself may become bad and illegal by being connected with a previous illegal contract. A man once brought an action on a covenant for payment of money. But the defendant set up the defence that a contract had been formerly entered into between himself and the plaintiff, by the terms of which the plaintiff was to sell him some land for the illegal purpose of being sold by lottery; and he said that the deed on which the plaintiff was now suing him was a security for the purchase-money of that land. The judges considered that this plea was an answer to the plaintiff's claim. "It is clear," they said, "that the covenant was given for payment of the purchase-money. It springs from and is a creature of the illegal agreement, and, as the law would not enforce the original illegal contract, so neither will it allow the parties to enforce a security for the purchase-money, which by the original bargain was tainted with illegality" (*z*).

Recovering money paid for illegal purpose.

Money paid for an illegal purpose may be recovered back any time before the illegal purpose has been carried out (*a*); but not afterwards, because then the parties are *in pari delicto*, and the

(*x*) See Consolidated Exploration and Finance Co. *v.* Musgrave, [1900] 1 Ch. 37; 69 L. J. Ch. 11; following Wilson *v.* Strugnell, and Herman *v.* Jeuchner, *infra*.

(*y*) [1892] 2 Q. B. 724; 61 L. J. Q. B. 738.

(*z*) Fisher *v.* Bridges (1854), 24 L. J. Q. B. 165; 3 E. & B. 642; and see Jennings *v.* Hammond (1882), 9 Q. B. D. 225; 51 L. J. Q. B. 493; Shaw *v.* Benson (1883), 11 Q. B. D. 563; 52 L. J. Q. B. 575; *Ex parte* Poppleton (1884), 14 Q. B. D. 379; 54 L. J. Q. B. 336.

(*a*) Taylor *v.* Bowers (1876), 1 Q. B. D. 291; 45 L. J. Q. B. 163; and Wilson *v.* Strugnell (1881), 7 Q. B. D. 548; 50 L. J. M. C. 145. But see Herman *v.* Jeuchner (1885), 15 Q. B. D. 561; 54 L. J. Q. B. 340.

maxim *melior est conditio possidentis* applies. "The true test," it was said in a case where a man tried unsuccessfully to get back a bank-note he had given a brothel-house keeper as a security for a debt for wines and suppers at the brothel (*b*), "for determining whether or not the plaintiff and the defendant were *in pari delicto*, is by considering whether the plaintiff could make out his case otherwise than through the medium and by the aid of the illegal transaction to which he was himself a party." So in Simpson *v.* Bloss (*c*), the plaintiff had bet 25 guineas with a Captain Brograve that a mare named Glaucina would win the Epsom Stakes, and the defendant agreed to contribute to the extent of 10 guineas. Glaucina won, and, in the expectation of getting the whole 25 guineas from the Captain, the plaintiff paid the defendant his 10 guineas. Unfortunately, Brograve immediately afterwards died, and the plaintiff never received the money. It was held that he was not entitled to recover the 10 guineas he had prematurely paid away, because his claim to do so was too much mixed up with the illegal transaction in which he and the defendant and Brograve had been jointly engaged. So in Kearley *v.* Thomson (*d*), it was held that money paid to the solicitors of a petitioning creditor to induce them not to appear at the public examination of a bankrupt and oppose his discharge cannot be recovered, although the contract is illegal, if there has been part performance of the contract.

Glaucina and the Epsom Stakes.

Kearley *v.* Thomson.

When it is doubtful whether a contract is legal or illegal, the presumption of law is in favour of its being legal (*e*).

Closely connected with the present subject is the doctrine of *ultra vires*. That is the name given to those contracts which, being beyond the purposes of its existence, a corporation has no power to make, and which are therefore void. See the notes to Arnold *v.* Mayor of Poole and Clarke *v.* Cuckfield Union, *ante*, pp. 27 *et seq.*

Ultra vires.

(*b*) Taylor *v.* Chester, L. R. 4 Q. B. 309; 38 L. J. Q. B. 225; and Herman *v.* Jeuchner, *ubi sup.*

(*c*) (1816), 7 Taunt. 246; 2 Marsh. 542.

(*d*) (1890), 24 Q. B. D. 742; 59 L. J. Q. B. 288.

(*e*) Lewis *v.* Davison (1839), 4 M. & W. 654; 1 H. & H. 425; Hire Purchase Furnishing Co. *v.* Richens (1887), 20 Q. B. D. 387; 58 L. T. 460.

Immorality.

[45] PEARCE *v.* BROOKS. (1866)

[L. R. 1 Ex. 213; 35 L. J. Ex. 134.]

A coach-builder who knows a woman to be a prostitute cannot recover for the price of a miniature brougham which he lets her have on credit, and which he is well aware she is going to use as part of her display to attract men.

Cannan *v.* Bryce.

In deciding this case the Court followed Cannan *v.* Bryce (*f*), where it was held that money lent and applied by the borrower for the purpose of settling losses on illegal stock-jobbing transactions, to which the lender was no party, could not be recovered back by him.

Lloyd *v.* Johnson.

There is a case of Lloyd *v.* Johnson (*g*), which may be thought to some extent to conflict with the leading case. The action was brought by a laundress against a woman of the town for the washing of a variety of dresses and some gentlemen's nightcaps, the plaintiff being well aware of the use to which the latter were put. It was held, nevertheless, that the plaintiff was entitled to recover. "This unfortunate woman," said Buller, J., "must have clean linen; and it is impossible for the Court to take into consideration which of these articles were used for an improper purpose and which were not."

To defeat the plaintiff's claim in an action of this kind, when he knew the purpose his goods were going to be put to, it is not necessary to show that he looked expressly to the profits of the prostitution for payment.

Immoral considerations.

Bonds given as an immoral consideration, *e.g.*, to induce the obligee to live in fornication with the obligor, are void (*h*), though it is otherwise when the bond is given in consideration of *past* seduction (*i*), even though the obligor does not cease to cohabit with the obligee (*k*). A mortgage in consideration of a loan made

Past seduction.

(*f*) (1819), 3 B. & Ald. 179; 22 R. R. 342.

(*g*) (1798), 1 B. & P. 340; 4 R. R. 822.

(*h*) Walker *v.* Perkins (1764), 3 Burr. 1568; 1 Wm. Bl. 517.

(*i*) Turner *v.* Vaughan (1767), 2 Wils. 339; Nye *v.* Moseley (1826), 6 B. & C. 133; 9 D. & R. 165.

(*k*) Hall *v.* Palmer (1844), 3 Hare, 532; 13 L. J. Ch. 353; *Re* Vallance (1884), 26 Ch. D. 353; 50 L. T. 474.

to the mortgagor, whose daughter the mortgagee had seduced, for the purpose of inducing him to allow continuation of the intercourse, was set aside in Willyams *v.* Bullmore (*l*). And in Brown *v.* Brine (*m*), the plaintiff had seduced a man's wife, and had then entered into an agreement with the husband that, if the latter would keep the affair secret, the former would not enforce payment of a certain bond. The husband died; and, thinking perhaps that the secret had died with him, the plaintiff sued on the bond. In answer to the claim, the executor pleaded the agreement; but the plea was held bad, on the ground that there was no valid consideration for the plaintiff's promise. When parties who have been living in concubinage execute a *quasi* separation deed to secure an annuity to the woman, an express provision that the annuity shall cease on resumption of cohabitation is void (*n*); and such a provision will not be implied (*o*).

Ex turpi causâ non oritur actio.

The Irish case of Hegarty *v.* Shine (*p*) well shows how severely the law regards this kind of immorality. The action was by a servant girl against a man who had had carnal knowledge of her with her consent, but without her knowing that he had got a bad venereal disease. This disease he communicated to her. In an action as for an assault, it was held that, arising as it did *ex turpi causâ*, it could not be maintained. It is not obvious, however, how this decision can be reconciled with the cases of Reg. *v.* Bennett (*q*) and Reg. *v.* Sinclair (*r*), where, under similar circumstances, it was held that the man might be convicted of an indecent assault, or of inflicting actual bodily harm, on the principle that fraud vitiates consent. But the judgment of Fitzgerald, J., even though erroneous in law, will well repay perusal. These two cases, however, were considered and practically overruled in the case of The Queen *v.* Clarence (*s*), where, in a Court of Crown Cases Reserved, consisting of thirteen judges, it was decided by Lord Coleridge, C. J., Pollock and Huddleston, BB., Stephen, Manisty, Mathew, A. L. Smith, Wills, and Grantham, JJ. (Field, Hawkins, Day, and Charles, JJ., dissenting), that a man cannot be convicted of unlawfully and maliciously inflicting grievous bodily harm, or of an assault occasioning actual bodily harm, who, at a time when he knew, but his wife did not know, that he was suffering from

The Queen *v.* Clarence.

(*l*) (1864), 33 L. J. Ch. 461; 9 L. T. 216.
(*m*) (1875), 1 Ex. Div. 5; 45 L. J. Ex. 129.
(*n*) *Ex parte* Naden (1874), L. R. 9 Ch. 670; 43 L. J. Bk. 121.
(*o*) *Re* Abdy, [1895] 1 Ch. 455; 64 L. J. Ch. 465.
(*p*) (1878), 4 L. R. Ir. 288; 14 Cox, C. C. 145.
(*q*) (1865), 4 F. & F. 1105.
(*r*) (1867), 13 Cox, 28.
(*s*) (1888), 22 Q. B. D. 23; 16 Cox, C. C. 511.

gonorrhœa, had connection with her with the result that the disease was communicated to her, although she would not have submitted to the intercourse had she been aware of his condition.

Specific performance.

In the recent case of Hope *v.* Walter (*t*), a house sold by auction was described as an "eligible freehold property for investment," let on a quarterly tenancy at £55 a year. It was discovered before completion that the house at the date of the sale was used by the tenant as a disorderly house, of which fact both the vendors and purchaser were previously ignorant. Although the agreement of tenancy contained a covenant not to use the house as a disorderly house and a proviso for re-entry on breach of the covenant, the Court of Appeal held that the improper use of the house (exposing as it did the owner to criminal proceedings if he took no steps to prevent it) was a sufficient ground for refusing specific performance at the suit of the vendors.

"The Memoirs of Harriette Wilson."

The principles above stated apply equally to all contracts having an immoral tendency. In Poplett *v.* Stockdale (*u*), it was held that the printer of an immoral and libellous work called the "Memoirs of Harriette Wilson" could not maintain an action for his bill against the publisher who employed him. "Everyone," said Best, C. J., "who gives his aid to such a work, though as a servant, is responsible for the mischief of it." In Fores *v.* Johnes (*x*), the defendant had told the plaintiff, a printseller in Piccadilly, to send him "all the caricature prints that had ever been published." The plaintiff accordingly sent a large quantity, but the defendant refused to receive them, on the ground that the collection contained several prints of obscene and immoral subjects. "For prints," said Lawrence, J., "whose objects are general satire or ridicule of prevailing fashions or manners, I think the plaintiff may recover; but I cannot permit him to do so for such whose tendency is immoral or obscene; nor for such as are libels on individuals, and for which the plaintiff might have been rendered criminally answerable for a libel."

Obscene caricatures.

(*t*) [1900] 1 Ch. 257; 69 L. J. Ch. 166.
(*u*) (1825), R. & M. 337; 2 C. & P. 198.
(*x*) (1802), 4 Esp. 96; 6 R. R. 840.

Contracts Impeding Administration of the Law.

SCOTT *v.* AVERY. (1855) [46]

[5 H. L. C. 811; 25 L. J. Ex. 303.]

This was an action by a gentleman, whose ship had been lost, against a Newcastle Insurance Association, of which both plaintiff and defendants were members. The defendants relied on one of the rules of their association (which the plaintiff as a member had, of course, bound himself to observe) providing that no member should bring an action on a policy till certain arbitrators had ascertained the amount that ought to be paid. In answer to that objection, the plaintiff contended that an agreement which ousts the superior Courts of their jurisdiction is illegal and void, and that the rule relied on by the defendants was of such a nature.

This view, however, did not prevail. Judgment was given for the defendants on the ground that the contract *did not oust the superior Courts of their jurisdiction, but only rendered it a condition precedent to an action that the amount to be recovered should be first ascertained by the persons specified.*

General rule.

By the common law an agreement to refer disputes to arbitration, to the exclusion of the jurisdiction of the ordinary Courts, is, generally speaking, inoperative, as being voidable on grounds of public policy. But although, as a rule, such an agreement will not avail to oust the Courts of their jurisdiction, and so to prevent an injured party from seeking redress in the ordinary way, yet it is so far valid that an action may be successfully maintained for the breach of it. The practical effect of the common law rule is not, however, very considerable, inasmuch as the Legislature has virtually rendered such an agreement capable of being enforced. It is provided by the Arbitration Act, 1889 (52 & 53 Vict. c. 49), repealing and replacing the Common Law Procedure Act, 1854

Action for breach.

Arbitration Act, 1889.

(17 & 18 Vict. c. 125), that a submission is irrevocable, unless a contrary intention is expressed, except by leave of the Court; and where there is a submission to arbitration, and any party commences an action, any party to such legal proceedings may apply to the Court to stay such proceedings, which stay will be granted if the Court is satisfied that there is no sufficient reason why the matter should not be referred in accordance with the submission (*y*). And, as may well be supposed, the discretion thus given to the Court is usually exercised to compel the reference to arbitration, except in the presence of special circumstances which would render such compulsion inequitable. Thus, in a case (*z*) *where fraud is charged*, the Court will in general refuse to send the dispute to arbitration if the party charged with the fraud desires a public inquiry. But when the objection to arbitration is raised by the party charging the fraud, the Court will not necessarily accede to it, and, indeed, will never do so unless a *primâ facie* case of fraud is proved.

No arbitration where fraud charged.

When application to stay should be made.

The application to stay proceedings under the Arbitration Act, 1889, may be made "at any time after appearance, and before delivering any pleadings or *taking any other steps in the proceedings*" (*a*). An application for a stay of proceedings until security for costs be given (*b*), or for particulars or for interrogatories (*c*), is a step in the proceedings; but a notice requiring the delivery of a statement of claim (*d*), or obtaining further time for the delivery of a defence (*e*), or filing affidavits in answer to affidavits filed in

(*y*) Farrar *v.* Cooper (1890), 44 Ch. D. 323; 59 L. J. Ch. 506; Turncock *v.* Sartoris (1890), 43 Ch. D. 150; 62 L. T. 209; *In re* Carlisle (1890), 44 Ch. D. 200; 59 L. J. Ch. 520; *In re* Smith and Service (1890), 25 Q. B. D. 545; 59 L. J. Q. B. 533 (explained in Manchester Ship Canal Co. *v.* Pearson, [1900] 2 Q. B. 606; 69 L. J. Q. B. 852); United Kingdom Steamship Assoc. *v.* Houston, [1896] 1 Q. B. 567; 65 L. J. Q. B. 484. See also Knight *v.* Coales (1887), 19 Q. B. D. 296; 56 L. J. Q. B. 486; Lyon *v.* Johnson (1889), 40 Ch. D. 579; 58 L. J. Ch. 626; Jackson *v.* Barry Ry. Co., [1893] 1 Ch. 238; 68 L. T. 472; Belfield *v.* Bourne, [1894] 1 Ch. 521; 63 L. J. Ch. 104; and Bright *v.* River Plate Construction Co., [1900] 2 Ch. 835; 70 L. J. Ch. 59. As to the jurisdiction of the Court to review the findings of an arbitrator, see Darlington Waggon Co. *v.* Harding, [1891] 1 Q. B. 245; 60 L. J. Q. B. 110; and *In re* Whiteley and Roberts Arbitration, [1891] 1 Ch. 558; 60 L. J. Ch. 149.

(*z*) Russell *v.* Russell (1880), 14 Ch. D. 471; 49 L. J. Ch. 268; Davis *v.* Starr (1889), 41 Ch. D. 242; 58 L. J. Ch. 808; explained in Renshaw *v.* Queen Anne Mansions Co., [1897] 1 Q. B. 662; 66 L. J. Q. B. 496. See also Barnes *v.* Youngs, [1898] 1 Ch. 414; 67 L. J. Ch. 263; and Parry *v.* Liverpool Malt Co., [1900] 1 Q. B. 339; 69 L. J. Q. B. 161.

(*a*) Sect. 4.

(*b*) Adams *v.* Catley (1892), 66 L. T. 687; 40 W. R. 570.

(*c*) Chappell *v.* North, [1891] 2 Q. B. 252; 60 L. J. Q. B. 554.

(*d*) Ives *v.* Willans, [1894] 2 Ch. 478; 63 L. J. Ch. 521.

(*e*) Ford's Hotel Co. *v.* Bartlett, [1896] A. C. 1; 65 L. J. Q. B. 166.

support of an application for the appointment of a receiver (*f*), have been held not to amount to a step in the proceedings. A stay will also be refused after an order has been made in the defendant's favour—as, for example, for discovery—on a summons for directions (*g*).

It has been decided (*h*) that the Court has jurisdiction to interfere by injunction, on equitable grounds, to restrain the defendant from proceeding to arbitration when an action has been brought impeaching the instrument containing the agreement for reference.

It is doubtful whether an agreement, that the parties to an arbitration will not ask that a special case shall be stated for the opinion of the Court, is valid (*i*).

As appears from the leading case, although a contract to refer is in general voidable, it is quite open to the parties to impose a condition precedent to the right of action; as, for example, that the amount of damages shall be ascertained by arbitration, or, as in the case of an ordinary building contract, that the builder is only to be paid if the architect or engineer certifies that the work has been properly done (*k*). When such a condition precedent is imposed by the agreement of the parties, no action, of course, lies until the condition upon which it may be brought has been duly performed (*l*). A good illustration of this is to be found in the case of Caledonian Insurance Co. *v.* Gilmour (*m*). There, a policy of fire insurance provided that any difference as to the amount payable under it in respect of any alleged loss or damage by fire should be referred to arbitration, and that "the obtaining of such award shall be a condition precedent to the commencement of any action upon

Architect's certificate condition precedent.

Caledonian Insce. Co. *v.* Gilmour.

(*f*) Lalinoff *v.* Hammond, [1898] 2 Ch. 92; 67 L. J. Ch. 370.

(*g*) County Theatres and Hotels, Limited *v.* Knowles, [1902] 1 K. B. 480; 71 L. J. K. B. 351; Richardson *v.* Le Maitre, [1903] 2 Ch. 222.

(*h*) Kitts *v.* Moore, [1895] 1 Q. B. 253; 64 L. J. Ch. 152; distinguishing North London Ry. Co. *v.* G. N. Ry. Co. (1883), 11 Q. B. D. 30; 52 L. J. Q. B. 380.

(*i*) See *In re* Montgomery (1898), 78 L. T. 406.

(*k*) As to the liability of an architect for negligence in giving certificates for work done, reference should be made to the judgments in the Court of Appeal in the recent case of Chambers *v.* Goldthorpe, [1901] 1 K. B. 624; 70 L. J. K. B. 482. And see Columbus Co. *v.* Clowes, [1903] 1 K. B. 244; 72 L. J. K. B. 330.

(*l*) Edwards *v.* Aberayron Mut. Ship. Ins. Co. (1876), 1 Q. B. D. 563; 44 L. J. Q. B. 67; Collins *v.* Locke (1879), 4 App. Cas. 674; 48 L. J. P. C. 68; Viney *v.* Bignold (1887), 20 Q. B. D. 172; 57 L. J. Q. B. 82.

(*m*) [1893] A. C. 85; 1 R. 110. See also Trainor *v.* Phœnix Fire Assurance Co. (1892), 65 L. T. 825; Scott *v.* Mercantile Accident Insurance Co. (1892), 66 L. T. 811; and Spurrier *v.* La Cloche, [1902] A. C. 446; 71 L. J. P. C. 101.

the policy"; and it was held, that the obtaining an award was a condition precedent to a right of action by the insured.

Dawson *v.* Fitzgerald.

The extent of the decision in Scott *v.* Avery may be well illustrated by comparing the two cases of Dawson *v.* Fitzgerald (*n*) and Babbage *v.* Coulbourn (*o*). In the former, a lessee had covenanted with his lessor that he would keep such a number only of hares and rabbits as would do no injury to the crops, and that in case he kept such a number as should injure the crops he would pay a fair and reasonable compensation, the amount of such compensation, in case of difference, to be referred to arbitration. The lessor having brought an action for breach of covenant, it was held *that the covenant to refer the amount of compensation was a collateral and distinct covenant from that to pay for the damage done, and therefore, that the action was maintainable although there had been no arbitration.* Thus the lessor might sue on the covenant to pay compensation, leaving the lessee to pursue one of two courses—either to bring an action for not referring, or to apply under the Act to have the proceedings stayed. If, however, the Court had come to the conclusion that, on the true construction of the agreement, it amounted only to a simple covenant *to pay such damages as should be ascertained by an arbitrator*, no action would have lain till he had so ascertained them. And now compare with this decision the case of Babbage *v.* Coulbourn. There, by a written agreement, the tenant of a furnished house agreed at the expiration of the term to deliver up possession of the house and furniture in good order, and in the event of loss, damage, or breakage, to make good or pay for the same, the amount of such payment, if disputed, to be settled by arbitration. It was held that the settlement of this amount by arbitration was a condition precedent to the right of the landlord to bring an action in respect of the dilapidations. As was observed by Huddleston, B., "The question in all these cases is whether or not there are separate and independent covenants: a covenant that an act shall or shall not be done, and a covenant to refer. Here the defendant agreed to deliver up the furniture in a certain condition, and agreed, not independently to refer, but to deliver up the furniture and pay any sum awarded by the valuers."

Babbage *v.* Coulbourn.

It must be observed that in many cases the real question between the parties to an agreement containing an arbitration clause is whether the matter in dispute is within or without the terms of this clause. This generally is a question for the arbitrator himself, and not for the Court. In an application on a summons for a compulsory

(*n*) (1876), 1 Ex. D. 257; 45 L. J. Ex. 893.

(*o*) (1882), 9 Q. B. D. 235; 51 L. J. Q. B. 638.

reference under the provisions of the Common Law Procedure Act, Lord Selborne observed (*p*): "It struck me throughout that the endeavour of the appellants has been to require this Court to do the very thing which the arbitrators ought to do—that is to say, to look into the whole matter, to construe the instrument, and to decide whether the thing which is complained of is inside or outside the agreement."

Specific performance.

The Court will not grant specific performance of an agreement to refer by compelling a party to appoint an arbitrator, or to execute an arbitration bond; and the Arbitration Act, 1889, does not give the Court power to make such an order (*q*).

Friendly Societies, &c.

The Legislature has, for public purposes, established certain exceptions to the general rule that agreements between private parties cannot oust the jurisdiction of the Courts, and has, in some instances, made arbitration obligatory by Act of Parliament. The most notable examples are the statutory provisions for reference to arbitration in the case of friendly and building societies (*r*), and the compulsory references under the Railway Companies Arbitration Act, 1859 (22 & 23 Vict. c. 59). Some statutes provide that certain disputes shall be settled by arbitration, and give the Court power to stay proceedings in an action, "upon being satisfied that no sufficient reason exists why the matter cannot be or ought not to be referred to arbitration." In such cases the burden (*s*) lies on the plaintiff to show some sufficient reason why the dispute should not be so referred.

(*p*) Willesford *v.* Watson (1873), L. R. 8 Ch. Ap. at p. 477; 42 L. J. Ch. 447; but see Piercy *v.* Young (1879), 14 Ch. D. 200; 42 L. T. 710.

(*q*) *In re* Smith and Service (1890), 25 Q. B. D. 545; 59 L. J. Q. B. 533; United Kingdom Steamship Assoc. *v.* Houston, [1896] 1 Q. B. 567; 65 L. J. Q. B. 484. But see Manchester Ship Canal Co. *v.* Pearson, [1900] 2 Q. B. 606; 69 L. J. Q. B. 852.

(*r*) Building Societies Act, 1884 (47 & 48 Vict. c. 41). See Western Suburban, &c. Co. *v.* Martin (1886), 17 Q. B. D. 609; 55 L. J. Q. B. 382; Christie *v.* Northern Counties Building Society (1890), 43 Ch. D. 62; 59 L. J. Ch. 210.

(*s*) Hodgson *v.* Railway Pass. Ass. Co. (1882), 9 Q. B. D. 188; Fox *v.* Railway Pass. Ass. Co. (1885), 54 L. J. Q. B. 505; 52 L. T. 672.

Restraint of Trade.

[47] MITCHEL *v.* REYNOLDS. (1711)

[1 P. Wms. 181.]

In Liquorpond Street, Holborn, something like 200 years ago, there dwelt a prosperous baker, who sold his business to the plaintiff, and executed a bond in which he undertook not to carry on the business of a baker in the parish of St. Andrew, Holborn, for five years, under a penalty of £50. The baker did not know his own mind, and long before the five years were over he was baking away as hard as ever, and in the aforesaid parish, too. But he had to pay Mitchel the £50.

Partial restraint good if reasonable and there is consideration.

To make a contract in restraint of trade good, two conditions must be complied with :—

(1.) *There must be a consideration;*

and this is necessary even though the contract is under seal (*t*).

(2.) *The restraint must be a reasonable one;*

that is to say, it must not be greater, either as to space or time, than such as to afford a *fair protection* to the interest of the party in whose favour it is submitted to, and must not be injurious to the interests of the public.

The reasonableness of a restraint differs according to trades and professions; whether any particular contract is reasonable or not, being a *question of law* for the Court (*u*). A tabular statement of cases (down to 1854), showing what restrictions have been held valid and what void in different kinds of business, is subjoined to the report of the case of Avery *v.* Langford (*x*); and the later decisions

(*t*) Because, otherwise it would be *unreasonable*. The Court, however, will not inquire into the *adequacy* of the consideration, though if it were so small as to be merely colourable the agreement might be held bad. See Hitchcock *v.* Coker (1837), 6 A. & E. 438; 6 L. J. Ex. 266; and Pilkington *v.* Scott (1846), 15 M. & W. 657; 15 L. J. Ex. 329.

(*u*) See per Lindley, M. R., in Haynes *v.* Doman, [1899] 2 Ch. 24; 68 L. J. Ch. 419.

(*x*) (1854), Kay, 667; 23 L. J. Ch. 837.

in the same form are given at p. 345 of Sir F. Pollock's "Principles of Contract," 6th edition (*y*).

Solicitor. Horse-hair manufacturer. Milkman. Surgeon. Publisher. Dentist

Contracts that a solicitor shall not practise "in London or within 150 miles" (*z*), or (in another case) "in any part of Great Britain" (*a*); that a horse-hair manufacturer shall not trade "within 200 miles of Birmingham" (*b*); that a milkman shall not sell milk "within five miles from Northampton Square in the county of Middlesex" (*c*); that a surgeon shall not practise on his own account within seven miles of a country town (*d*); and that a publisher shall not carry on the trade "within 150 miles of the General Post Office, London" (*e*), have been held to be valid contracts in restraint of trade. On the other hand, an agreement that a dentist—"a moderately skilful dentist"—should abstain from practising within 100 miles of York was held void, as the distance was greater than was necessary to protect the interest of the person with whom he had contracted (*f*).

Contract may be partly good and partly bad.

A contract in restraint of trade may be *partly good and partly bad*. Thus, in Mallan *v.* May (*g*), the defendant was engaged as an assistant to the plaintiffs, who were dentists, and promised that, when he left them, he would not practise as a dentist *in London or in any other place in England or Scotland where they might have been practising*. This covenant was held good as to London ("London" being held to be *the city* of London), but bad as to all the other places. So in a case (*h*) where a person bound himself not to carry on the trade of a perfumer, toyman, or hair merchant *within the cities of London or Westminster, or within the distance of* 600 *miles*, it

(*y*) See also Perls *v.* Saalfeld, [1892] 2 Ch. 149; 61 L. J. Ch. 409; Moenich *v.* Fenestre (1892), 61 L. J. Ch. 737; 67 L. T. 602.

(*z*) Bunn *v.* Guy (1803), 4 East, 190; 7 R. R. 210; and see Dendy *v.* Henderson (1855), 11 Ex. 194; 24 L. J. Ex. 324; May *v.* O'Neill (1875), W. N. 179; 44 L. J. Ch. 660.

(*a*) Whittaker *v.* Howe (1841), 3 Beav. 383; 52 R. R. 162.

(*b*) Harms *v.* Parsons (1861), 32 Beav. 328; 32 L. J. Ch. 247.

(*c*) Proctor *v.* Sargent (1840), 2 M. & G. 20; 2 Scott, N. R. 289; and Benwell *v.* Inns (1857), 24 Beav. 307; 27 L. J. Ch. 663.

(*d*) Sainter *v.* Ferguson (1849), 7 C. B. 716; 18 L. J. C. P. 217. See also Gravely *v.* Barnard (1874), 18 Eq. 518; 43 L. J. Ch. 659; Palmer *v.* Mallett (1887), 36 Ch. D. 411; 57 L. J. Ch. 226; and Rogers *v.* Drury (1887), 57 L. J. Ch. 504; 36 W. R. 496.

(*e*) Tallis *v.* Tallis (1853), 1 E. & B. 391; 22 L. J. Q. B. 185.

(*f*) Horner *v.* Graves (1831), 7 Bing. 735; 5 M. & P. 568.

(*g*) (1843), 11 M. & W. 653; 12 L. J. Ex. 376; and see Baines *v.* Geary (1887), 35 Ch. D. 154; 56 L. J. Ch. 935; Davies *v.* Lowen (1891), 64 L. T. 655; Rogers *v.* Maddocks, [1892] 3 Ch. 346; 62 L. J. Ch. 219; Haynes *v.* Doman, *supra*.

(*h*) Price *v.* Green (1847), 16 M. & W. 346; 16 L. J. Ex. 308; but see Baker *v.* Hedgcock (1888), 39 Ch. D. 520; 57 L. J. Ch. 889.

was held that the badness of the restraint as to the 600 miles' radius would not vitiate its goodness as to London and Westminster.

In all these cases the distance is measured, not by the nearest convenient route, but *as the crow flies* (*i*).

Until recently it was thought that, *if the area was unlimited*, a covenant in restraint of trade was on the face of it bad; and, for a considerable time, the law on this subject was in a very unsatisfactory and uncertain condition. The matter, however, was settled by the House of Lords in the important case of Nordenfelt *v.* Maxim-Nordenfelt Guns and Ammunition Co. (*k*), which must now be considered as the leading case on this branch of law. It was there held that *the true test of the validity of a covenant which is in restraint of trade, whether the restraint be general or partial, is whether it is or is not reasonable; and that such a covenant may be unlimited in point of space, provided that it is not more than is reasonably necessary for the protection of the covenantee*, and *is in no way injurious to the interests of the public*. The judgments of Lord Herschell, L. C., and Lord Macnaghten, contain an exhaustive review and criticism of the earlier cases on this point, and trace the changes in the law which have been rendered necessary by the altered conditions of commerce and of the means of communication which have been developed in recent years.

Nordenfelt's case.

It has recently been held that a covenant "not to employ anyone or retail milk on his own account in the *neighbourhood* of Southampton or Norham," was neither too wide nor too indefinite, and that the word "neighbourhood" meant immediate neighbourhood. "The word 'neighbourhood,'" said Channell, J., "equals in this case a distance to stop competition" (*l*). Another recent case to which reference should be made is Dubowski *v.* Goldstein (*m*). The defendant entered into an agreement to serve the plaintiff in his business of dairyman as a milk-carrier, and agreed that he would not during the continuance of the service nor at any time thereafter

Not too vague.

Dubowski *v.* Goldstein.

(*i*) Mouflet *v.* Cole (1872), L. R. 8 Ex. 32; 42 L. J. Ex. 8.

(*k*) [1894] A. C. 535; 63 L. J. Ch. 908. See also Underwood *v.* Barker, [1899] 1 Ch. 300; 68 L. J. Ch. 201. Former modern cases are Leather Cloth Co. *v.* Lorsont (1869), L. R. 9 Eq. 345; 39 L. J. Ch. 86; Allsopp *v.* Wheatcroft (1872), L. R. 15 Eq. 59; 42 L. J. Ch. 12; Roussillon *v.* Roussillon (1880), 14 Ch. D. 351; 49 L. J. Ch. 339; Davies *v.* Davies (1887), 36 Ch. D. 359; 56 L. J. Ch. 962; Mills *v.* Dunham, [1891] 1 Ch. 576; 60 L. J. Ch. 362; Badische Anilin Fabrik *v.* Schott, [1892] 3 Ch. 447; 61 L. J. Ch. 698. These, and many earlier cases, are, of course, now annulled so far as they conflict with the modern rule established by the decision of the House of Lords in Nordenfelt's case.

(*l*) Stride *v.* Martin (1898), 77 L. T. 600.

(*m*) [1896] 1 Q. B. 478; 65 L. J. Q. B. 397.

serve, for his own benefit or for the benefit of any other person, or solicit or in any way interfere with any of the customers who should at any time be served by the plaintiff in his business. The Court of Appeal held that this clause was severable, and that an injunction could properly be granted restraining the defendant from serving persons who were customers of the plaintiff during the employment of the defendant by the plaintiff. Lord Esher, M. R., and Rigby, L. J. (Lopes, L. J., dissenting), further held that, without any severance, the restriction clause was valid, as it did not go beyond what was reasonably necessary for the protection of the plaintiff's business.

Sale of goodwill.

With regard to the right of the vendor of a goodwill to set up a new business and deal with his old customers, reference should be made to the recent case of Trego *v.* Hunt (*n*), approving the decision in the earlier case of Labouchere *v.* Dawson (*o*), and overruling the reasoning in Pearson *v.* Pearson (*p*). See *ante*, p. 95.

Trego *v.* Hunt.

Construction.

Where one trader agrees with another that during a term of years he will not "erect or assist, or be in any way concerned or interested in the erection or use" of works, or "do anything of the like nature which may in any way interfere with or restrict the output, business, trade, or profits" of the other, it is not a breach of such agreement to contract with a third person to take the whole output of his business, or to contract to purchase at the end of the term the whole business of that third person, although in the meantime additional works are to be constructed in connection therewith; nor is it a breach to lend money to that third person when such loan is independent of the contract with him (*q*).

Southland Frozen Meat Co. *v.* Nelson.

Hilton *v.* Eckersley.

Combinations in restraint of trade, whether of masters or of men, are at common law invalid. The great case on the subject is Hilton *v.* Eckersley (*r*), where a bond entered into by a number of Wigan mill-owners, who agreed to decide the times, wages, &c., of all their workmen according to the resolutions of a majority of themselves, was held void.

Collins *v.* Locke.

But it has been held that an agreement to parcel out among the parties to it the stevedoring business of a port, and so to prevent competition among the parties and to keep up the price of the work, is not necessarily invalid if carried into effect by

(*n*) [1896] A. C. 7; 65 L. J. Ch. 1.

(*o*) (1872), L. R. 13 Eq. 322; 41 L. J. Ch. 427.

(*p*) (1884), 27 Ch. D. 145; 54 L. J. Ch. 32. See the cases there cited, and also Vernon *v.* Hallam (1886), 34 Ch. D. 748; 56 L. J. Ch. 115; Smith *v.* Hancock, [1894] 2 Ch. 377; 63 L. J. Ch. 477; and Gophir Diamond Co. *v.* Wood, [1902] 1 Ch. 950; 71 L. J. Ch. 550.

(*q*) Southland Frozen Meat Co. *v.* Nelson, [1898] A. C. 442; 67 L. J. P. C. 82.

(*r*) (1856), 6 E. & B. 47, 66; 24 L. J. Q. B. 353.

proper means (*s*). "It is perfectly lawful," said the Court, in another case (*t*), "for the owners of three quarries to agree that they will sell their commodities upon terms suitable to themselves, and which they approve of; and although they know that the purchaser is going to supply, or offer to supply, the Corporation of Birmingham with the commodity, that does not in the least restrict their right to deal *inter se*, nor does such dealing deserve to be characterized as a conspiracy. There is nothing illegal in the owners of commodities agreeing that they will sell as between themselves at a certain price, leaving one of them to make any other profit that he can." It has, however, been held that an agreement by the members of an association not to sell certain goods at less than a particular price for ten years, and to forfeit £10 for each contravention of this agreement, was void (*u*). But an agreement made by a trader with a purchaser of his commodities not to sell them below certain prices set out in the agreement, and that if he sells them again to the trade he will procure a similar signed agreement from every retailer that he supplies, is valid (*x*).

Jones *v.* North.

Urmston *v.* Whitelegg.

Elliman *v.* Carrington.

A rule of a trade society that no member shall employ any traveller, carman, or outdoor employee who had left the service of another member without the consent in writing of his late employer, until after the expiration of two years from his leaving such service, is bad (*y*).

Mineral Water Bottle Society *v.* Booth.

The law relating to what may be termed "commercial conspiracy," or combinations to exclude the competition of rival traders, was elaborately discussed in the important case of the Mogul Steamship Co. *v.* McGregor, Gow & Co. (*z*). The defendants, who were firms of shipowners trading between China and Europe, with a view to obtaining for themselves a monopoly of the homeward tea trade, and thereby keeping up the rate of freight, formed themselves into an association, and offered to such merchants and shippers in China as shipped their tea exclusively in vessels belonging to members of the association a rebate of 5 per cent. on all freights paid by them. The plaintiffs, who were rival shipowners trading between China and Europe, were excluded by the defendants from all the benefits of the association, and, in consequence

Commercial conspiracy.

(*s*) Collins *v.* Locke (1879), 4 App. Cas. 674; 48 L. J. P. C. 68.

(*t*) Jones *v.* North (1875), L. R. 19 Eq. 426; 44 L. J. Ch. 388.

(*u*) Urmston *v.* Whitelegg (1891), 63 L. T. 455; 55 J. P. 453.

(*x*) Elliman *v.* Carrington, [1901] 2 Ch. 275; 70 L. J. Ch. 577.

(*y*) Mineral Water Bottle Society *v.* Booth (1887), 36 Ch. D. 465; 57 L. T. 573.

(*z*) [1892] A. C. 25; 61 L. J. Q. B. 295.

of such exclusion, sustained damage. The Court of Appeal (by Bowen and Fry, L. JJ., Lord Esher, M. R., dissenting), affirming the judgment of Lord Coleridge, C. J. (*a*), held that the association, being formed by the defendants with the view of keeping the trade in their own hands, and not with the intention of ruining the trade of the plaintiffs, or through any personal malice or ill-will towards them, was not unlawful, and that no action for conspiracy was maintainable; and this decision was affirmed by the House of Lords.

Allen *v.* Flood.

Reference may here be made to a series of recent cases arising out of disputes between employers and their workmen, of which Allen *v.* Flood (*b*) is one of the most important. The facts in that case were as follows:—Boiler makers in common employment with the respondents, who were shipwrights working on wood, objected to work with the latter on the ground that in a previous employment they had been engaged on ironwork. The appellant, an official of the Boiler Makers' Union, in response to a telegram from one of the boiler makers, came to the yard and dissuaded the men from immediately leaving their work, as they threatened to do, intimating that if they did so he would do his best to have them deprived of the benefits of the union, and also fined; they must wait till the matter was settled. The appellant then saw the managing director, to whom he said that if the respondents, who were engaged from day to day, were not dismissed, the boiler makers would leave their work or be called out. The respondents were thereupon dismissed. The case was twice argued before the House of Lords, who also obtained the written opinions of the judges of the High Court, and it was held, by six of their lordships as against three, that no actionable wrong had been committed by the appellant. The *dicta* of Lord Esher, M. R., and Lopes, L. J., in Temperton *v.* Russell (*c*), that it is actionable maliciously to induce a person not to enter into a contract, were disapproved; and it was decided that an act lawful in itself is not converted by a malicious or bad motive into an unlawful act so as

(*a*) 21 Q. B. D. 544; 59 L. T. 514; 23 Q. B. D. 598; 58 L. J. Q. B. 465.

(*b*) [1898] A. C. 1; 67 L. J. Q. B. 119. In Bradford Corporation *v.* Pickles, [1895] A. C. 587; 64 L. J. Ch. 759, the House of Lords had previously decided that an act which is lawful in itself does not become unlawful because it is done with malicious intent.

(*c*) [1893] 1 Q. B. 715; 62 L. J. Q. B. 412. The decision in this case was that a combination by two or more persons to induce others not to deal with, or to enter into contracts with, a particular individual, is actionable, if done for the purpose of injuring that individual, provided that he is thereby injured.

to make the doer of the act liable to a civil action, the *dicta* in this regard of Lord Esher, M. R., in Bowen *v.* Hall (*d*), and in Temperton *v.* Russell (*e*), being disapproved.

Huttley *v.* Simmons.

In Huttley *v.* Simmons (*f*), it was held (following Allen *v.* Flood), that a combination between two or more persons to induce others not to employ a particular person nor to permit him to be employed, even if the acts are maliciously done and with an intention to injure such person, is not actionable if no civil injury results to him in consequence, for *a conspiracy to do certain acts gives a right of action only when the acts agreed to be done, and in fact done, would, had they been done without preconcert, have involved a civil injury to the person against whom they were directed.*

Quinn *v.* Leathem.

Allen *v.* Flood (*supra*) was distinguished in Quinn *v.* Leathem (*g*), and the following rules established, namely:—(1) A conspiracy to injure, if there be damage, gives rise to civil liability; and an oppressive combination differs widely from an invasion of civil rights by a single person; (2) It is an actionable wrong to interfere with contractual relations recognised by law *if there be no sufficient justification* for the interference; and this principle is not to be confined to inducements to break contracts of service; (3) If such wrongful interference with a man's liberty of action is intended to injure, and in fact damages, a third person, such third person has a remedy by action; (4) Annoyance and coercion by many may be actionable when like conduct on the part of one person would not be so.

What amounts to justification.

As to what constitutes "*sufficient justification*" for a procurement of a breach of contractual rights, the two latest cases on this subject should be considered—Read *v.* Friendly Society of Operative Stonemasons (*h*), and Glamorgan Coal Co. *v.* South Wales Miners' Federation (*i*). In the former case it was held that persons who, acting in concert, knowingly and for their own ends induce the commission of an actionable wrong, and employ illegal means to bring it about, commit an actionable wrong which is incapable of justification; while, in the latter, it was held by the Court of Appeal, reversing a decision of Bigham, J., that an intentional interference with the legal right of another person, *e.g.*, the procuring of a breach of contract with him, is an actionable wrong, unless there be sufficient justification for the interference. And

(*d*) (1881), 6 Q. B. D. 333; 50 L. J. Q. B. 305.
(*e*) [1893] 1 Q. B. 715; 62 L. J. Q. B. 412.
(*f*) [1898] 1 Q. B. 181; 67 L. J. Q. B. 213.
(*g*) [1901] A. C. 495; 70 L. J. P. C. 76.
(*h*) [1902] 2 K. B. 732; 71 L. J. K. B. 994.
(*i*) [1903] 2 K. B. 545.

that the circumstances which will constitute sufficient justification cannot be satisfactorily defined, and it must be left to the determination of the Court in each case whether there is sufficient justification for the interference. Accordingly, "justification" seems to depend upon a consideration of the whole conduct of the person who interferes—the means he used as well as the end he had in view.

Picketing. Picketing,—that is, watching or besetting the house or place of business or the approach thereto, of any person within the meaning of sect. 7, sub-sect. 4 of the Conspiracy and Protection of Property Act, 1875 (*k*)—excepting where such picketing is for the limited purposes of obtaining or communicating information according to the proviso to that section, is illegal, and will be restrained by interlocutory injunction (*l*). And to watch or beset a man's house with the view to compel him to do or not to do that which is lawful for him not to do or to do, is, unless some reasonable justification for it exists, a wrongful act: (1) because it is an offence within sect. 7 of the Conspiracy and Protection of Property Act, 1875 (*m*); and (2) because it is a nuisance at common law for which an action on the case would lie; for such conduct seriously interferes with the ordinary comfort of human existence and the ordinary enjoyment of the house beset (*n*).

Conciliation Act, 1896. Reference may be made to the Conciliation Act, 1896 (59 & 60 Vict. c. 30), which was passed with the object of preventing strikes between employers and their workpeople.

Trade Union Act, 1871. Moreover, the Trade Union Act, 1871 (*o*), provides (sect. 3) that "The purposes of any trade union shall not, by reason merely that they are in restraint of trade, be unlawful so as to render void or voidable any agreement or trust." Sect. 4, however, specifies certain exceptions. Every man has the right to get the best possible price for his work; but if others choose to work for less than the usual prices, the law will not permit violence or undue influence to be exercised upon them, or upon those by whom they are employed, or those with whom they are connected. The follow-

(*k*) 38 & 39 Vict. c. 86.

(*l*) Lyons *v.* Wilkins, [1896] 1 Ch. 811; 65 L. J. Ch. 601.

(*m*) *Supra.*

(*n*) Per Lindley, M. R., and Chitty, L. J., in Lyons *v.* Wilkins (No. 2), [1899] 1 Ch. 255; 68 L. J. Ch. 146; approving Lyons *v.* Wilkins (No. 1), *supra*; and holding that it was in no way overruled by Allen *v.* Flood, *supra*. See also Bamford *v.* Turnley (1860), 3 B. & S. 62; 31 L. J. Q. B. 286; Broder *v.* Saillard (1876), 2 Ch. D. 692, 701; 45 L. J. Ch. 414; Walter *v.* Selfe (1851), 4 De G. & Sm. 315; 20 L. J. Ch. 433; Crump *v.* Lambert (1867), L. R. 3 Eq. 409; 15 L. T. 600; Charnock *v.* Court, [1899] 2 Ch. 35; 68 L. J. Ch. 550; and Walters *v.* Green, [1899] 2 Ch. 696; 68 L. J. Ch. 730.

(*o*) 34 & 35 Vict. c. 31.

ing cases may be consulted on this subject:—Rex *v.* Batt (1834), 6 C. & P. 329; Walsby *v.* Anlay (1861), 3 El. & El. 516; 30 L. J. M. C. 121; O'Neill *v.* Longman (1863), 4 B. & S. 376; 9 Cox, C. C. 360; Wood *v.* Bowron (1866), L. R. 2 Q. B. 21; 36 L. J. M. C. 5; Skinner *v.* Kitch (1867), L. R. 2 Q. B. 393; 36 L. J. M. C. 116; Reg. *v.* Druitt (1867), 10 Cox, C. C. 592; 16 L. T. 855; Springhead Spinning Co. *v.* Riley (1868), L. R. 6 Eq. 551; 37 L. J. Ch. 889; Rigby *v.* Connol (1880), 14 Ch. D. 482; 49 L. J. Ch. 328; Duke *v.* Littleboy (1880), 49 L. J. Ch. 802; 43 L. T. 216; Wolfe *v.* Matthews (1882), 21 Ch. D. 194; 51 L. J. Ch. 833; Strick *v.* Swansea Tin Plate Co. (1887), 36 Ch. D. 558; 57 L. J. Ch. 438; Chamberlain's Wharf, Ld. *v.* Smith, [1900] 2 Ch. 605; 69 L. J. Ch. 783.

The Taff Vale case.

It has recently been decided by the House of Lords that a trade union registered under the Act of 1871 may be sued in its registered name (*p*), and the trustees of a trade union can be sued in that capacity so as to bind the funds of the trade union for a libel contained in a newspaper of which as such trustees they are registered proprietors, and which is carried on in the interests of the members of the trade union (*q*).

Markets.

The exclusive right of holding markets, and of preventing sales by others of marketable articles within the limits of the market, may be gained by (a) immemorial enjoyment, (b) charter from the Crown, (c) Act of Parliament. The important cases dealing with this subject are:—Macclesfield *v.* Pedley (1833), 4 B. & Ad. 397; 1 N. & M. 708; Macclesfield *v.* Chapman (1843), 12 M. & W. 18; 13 L. J. Ex. 32; Ellis *v.* Bridgnorth (1863), 15 C. B. N. S. 52; 32 L. J. C. P. 273; Penryn *v.* Best (1878), 3 Ex. D. 292; 48 L. J. Ex. 103; Elwes *v.* Payne (1879), 12 Ch. D. 468; 48 L. J. Ch. 831; Goldsmid *v.* Great Eastern Ry. Co. (1884), 9 App. Cas. 927; 54 L. J. Ch. 162; Att.-Gen. *v.* Horner (1885), 11 App. Cas. 66; 55 L. J. Q. B. 193; Devonshire *v.* O'Brien (1887), 19 L. R. Ir. 380; Birmingham *v.* Foster (1894), 73 L. T. 371; Stevens *v.* Chown, [1901] 1 Ch. 894; 70 L. J. Ch. 571; and Newcastle (Duke) *v.* Worksop Urban Council, [1902] 2 Ch. 145; 71 L. J. Ch. 487; where the distinction between the franchises of fairs and markets, and the question of tolls, is exhaustively discussed in the learned judgment of Farwell, J.

(*p*) Taff Vale Railway *v.* Amalgamated Society of Railway Servants, [1901] A. C. 426; 70 L. J. K. B. 905.

(*q*) Linaker *v.* Pilcher (1901), 70 L. J. K. B. 396; 84 L. T. 421.

Restraint of Marriage.

LOWE *v.* PEERS. (1768) [48]

[4 Burr. 2225; Wilmot, 364.]

Peers executed a document to this purport:—

"*I do hereby promise Mrs. Catherine Lowe that I will not marry with any person besides herself; if I do, I agree to pay to the said Catherine Lowe* £1,000 *within three months next after I shall marry anyone else.*"

Ten years afterwards Peers married a girl that was not Catherine Lowe. The injured lady brought an action on the document, but it was held void as being in restraint of marriage. According to the view of the judges, Peers's promise had *not* been *to marry Mrs. Lowe*, but *not to marry anybody except* Mrs. Lowe: so that if she refused to marry him, he would be compelled to be a bachelor all his days.

Reason of the thing.

A general restraint of marriage is against the policy of the law, because, as Lord Chief Justice Wilmot pointed out in the leading case, it *encourages licentiousness, and tends to depopulation;* and a condition imposing such a restraint is void. So also is a condition amounting to a *probable* prohibition, as where a testator's legacy to his daughter was conditional on her marrying a man with an estate worth £500 a year (*r*). "How many particular professions," said the Lord Chancellor, in giving judgment in that case, "are virtually excluded by that condition? What man of the profession of the law has set out with a clear unincumbered real estate of £500 a year, or has acquired such an estate for years after his entering into the profession? How many men of the other learned professions can come within the condition? It will in effect exclude 99 men in 100 of every profession, whether civil, military, or ecclesiastical. It in effect excludes nearly every mercantile man in the kingdom, for let his *personal* estate be never so great, unless he is seised of a *real* estate of the ascertained description, he is

Keily *v.* Monck.

(*r*) Keily *v.* Monck (1795), 3 Ridg. P. C. 205.

excluded. . . . In a word, the condition which this weak old man would have imposed upon his daughters as the price of their portions does, to my judgment, clearly and unequivocally lead to a total prohibition of their marriage, and as such ought to be condemned in every court of justice. And I cannot but say that the scene of enmity and discord and disunion which has now prevailed for years in this family ought to teach every man who hears me the mischievous folly of attempting to indulge his narrowness and caprice even after he has sunk into the grave." And even if the restraint is not general, but only for two or three years, there must be some good reason why the contractor should be restrained from marrying during that period (*s*).

How far restraint allowable.

But, as the general rule, *all conditions which do not, directly or indirectly, import an absolute injunction to celibacy are valid.*

Thus, conditions prohibiting marriage *before twenty-one* (*t*), or with a *specified person* (*u*), or with a *Scotchman* (*x*), or with a *papist* (*y*), or with a *domestic servant* (*z*), or with "*a man beneath her in life, that is to say, below her in social position*" (*a*), are not illegal.

Consent of trustee.

Testators leaving young daughters frequently prohibit their marriage without the *consent of a trustee.* This consent, however, cannot be withheld corruptly or unreasonably (*b*); and the marriage will be allowed to take place if it is a proper one (*c*). It appears to be a moot point whether conditions requiring marriage with consent are broken by a first marriage without consent, so as to disable a legatee from taking upon a second marriage with consent (*d*).

It has recently been decided that when a testator bequeaths an annuity in any event, followed by an additional annuity conditional on the annuitant marrying with consent, the condition is operative, and not *in terrorem* merely (*e*).

Second marriages.

Second marriages may be restrained. A husband, for instance, may leave his widow an annuity which is to cease on her marrying

(*s*) Hartley *v.* Rice (1808), 10 East, 22; 10 R. R. 228; Baker *v.* White (1690), 2 Vern. 215.

(*t*) Stackpole *v.* Beaumont (1796), 3 Ves. 89; 3 R. R. 52.

(*u*) Jervois *v.* Duke (1681), 1 Vern. 19.

(*x*) Perrin *v.* Lyon (1807), 9 East, 170.

(*y*) Duggan *v.* Kelly (1847), 10 Ir. Eq. Rep. 295.

(*z*) Jenner *v.* Turner (1880), 16 Ch. D. 188; 50 L. J. Ch. 161.

(*a*) Greene *v.* Kirkwood, [1895] 1 Ir. R. 130, C. A.

(*b*) Dashwood *v.* Bulkeley (1804), 10 Ves. 230; 12 R. R. 128, n.

(*c*) Goldsmid *v.* Goldsmid (1815), Coop. 225; 19 Ves. 368.

(*d*) See Randal *v.* Payne (1705), 1 Bro. C. C. 55; Page *v.* Hayward (1705), 2 Salk. 570.

(*e*) *In re* Nourse, Hampton *v.* Nourse, [1899] 1 Ch. 63; 68 L. J. Ch. 15; following Gillett *v.* Wray (1715), 1 P. Wms. 284; and distinguishing Reynish *v.* Martin (1746), 3 Atk. 330.

again. In Allen *v.* Jackson (*f*), a testatrix gave the income of certain property to her niece (who was her adopted daughter) and her niece's husband during their joint lives, and to the survivor during his or her life, with a proviso that if the husband survived his wife and married again, the property should go over. That was just what happened. The niece died; the widower married again; and the gift over took effect. "The present state of the law," said Baggallay, L. J., "as regards conditions in restraint of the second marriage of a woman, is this, that they are exceptions from the general rule that conditions in restraint of marriage are void, and the enunciation of that law has been gradual. In the first instance, it was confined to the case of the *testator being a husband* of the widow. In the next place, it was extended to the case of a *son making a will* in favour of his mother. That, I think, is laid down in Godolphin's Orphan's Legacy. Then came the case before Vice-Chancellor Wood of Newton *v.* Marsden (*g*), in which it was held to be a general exception *by whomsoever the bequest may have been made.* Now, the only distinction between those cases and the present case is this—that they all had reference to the second marriage of a *woman*, and this case has reference to the second marriage of a *man*. But no case has been cited in which a condition has been held to be utterly void as regards the second marriage of a *man;* and following the analogy of the other cases there seems *no reason at all why a distinction should be drawn between the two sexes.*" Allen *v.* Jackson.

Besides making contracts in general restraint of marriage void, the law exhibits its tender regard for the hallowed institution by declaring equally void a *marriage brokerage contract*, that is, a contract (*e.g.*, with a lady's maid) to bring about a particular marriage (*h*). A mother once told a candidate for son-in-lawship, "You shall not have my daughter unless you will agree to release all accounts." He agreed, but the agreement was held to be a marriage brokerage contract, and void (*i*). Marriage brokerage contracts.

Similarly, a contract relating to the *future* separation of a married couple is illegal and void, for such a state of things ought not to be considered likely to come about; it ought to be absent from the thoughts of the blissful pair; and indeed the contract itself might lead to a separation. But a contract relating to an *immediate* separation is valid, for it is necessary to make the best of a bad Future separation. Immediate separation.

(*f*) (1875), 1 Ch. D. 399; 45 L. J. Ch. 310.

(*g*) (1862), 2 J. & H. 356; 31 L. J. Ch. 690.

(*h*) Hall *v.* Potter (1695), 3 Lev. 411; Cole *v.* Gibson (1750), 1 Ves. 503.

(*i*) Hamilton *v.* Mohun (1710), 1 P. Wms. 118.

thing (*k*). If, however, after the separation deed has been executed, the contemplated separation does not take place, the deed becomes worthless, and cannot be construed as a voluntary settlement (*l*).

A separation deed need not contain a *dum casta* clause, and such a clause will not be implied so as to debar the wife, who has subsequently committed adultery, from claiming an annuity stipulated for (*m*).

A covenant not to revoke a will is not necessarily against public policy as being in restraint of marriage (*n*).

Atheism.

[49] COWAN *v.* MILBOURNE. (1867)

[L. R. 2 Ex. 230; 36 L. J. Ex. 124.]

Mr. Cowan was the secretary of the Liverpool Secular Society, and the defendant the proprietor of some Assembly Rooms there. Cowan engaged the rooms for a series of lectures to show that Our Lord's character was defective, and his teaching erroneous; and that the Bible was no more inspired than any other book. At the time the defendant let the rooms he did not know the nature of the lectures to be delivered, and when he found out, he declined to complete his agreement. The secularists now sued him for breach of contract, but the Court decided that the purpose for which the plaintiff intended to use the

(*k*) Hindley *v.* Westmeath (1828), 6 B. & C. 200; 5 L. J. K. B. 115.
(*l*) Bindley *v.* Mulloney (1869), L. R. 7 Eq. 343; 20 L. T. 263.
(*m*) Fearon *v.* Aylesford (1885), 14 Q. B. D. 792; 54 L. J. Q. B. 33; Sweet *v.* Sweet, [1895] 1 Q. B. 12; 64 L. J. Q. B. 108; and Wasteneys *v.* Wasteneys, [1900] A. C. 446; 69 L. J. P. C. 83.
(*n*) Robinson *v.* Ommanney (1883), 21 Ch. D. 780; 23 Ch. D. 285; 51 L. J. Ch. 894; 52 L. J. Ch. 440.

rooms was illegal, and the contract one which could not be enforced at law. "*Christianity*," said Kelly, C. B., "*is part and parcel of the law of the land.*"

Christianity part of the law of England.

"Christianity is part of the law of England." This is shown not merely by the existence of a church establishment, but by the various punishments inflicted, or capable of being inflicted, on persons who profanely curse, who break the Sabbath, who use witchcraft, or who give expression to unorthodox views. In a judgment in a slavery case (*o*), Best, J., says, "The proceedings in our Courts are founded upon the law of England, and that law again is founded upon the law of Nature, and the revealed law of God. If the right sought to be enforced is inconsistent with either of these, the English municipal Courts cannot recognise it." Notwithstanding this strong language, however, it would appear that a contract for the sale of slaves entered into and to be performed in a country where that unnatural traffic is lawful might be enforced in England (*p*).

Slavery.

Blasphemy.

The following summary from the *Law Times* of July 22nd, 1882, on the subject of blasphemy may be of interest:—

"Of the leading cases on this subject the earliest on record is that of one Atwood, in 15 Jac. 1, who was convicted of speaking words reflecting on religious preaching, viz., that it was 'but prating, and the hearing of service more edifying than two hours' preaching.' Notice may also be made of the trial of one Taylor (Vent. 293), for uttering gross blasphemies, in the course of which Chief Justice Hale observed that to say religion is a cheat is to dissolve all those obligations whereby civil society is preserved; that Christianity is part of the laws of England, and therefore to reproach the Christian religion is to speak in subversion of the law. On the same ground a conviction was sustained in the case of R. *v.* Woolston (Str. 834), where the libel stated that Christ was an impostor and fanatic, and his life and miracles were turned into ridicule. In 1763, again, one Annett was convicted of publishing a libel called 'The Free Inquirer,' tending to ridicule the Scriptures, and particularly the Pentateuch, by representing Moses as an impostor; and a similar result followed the case of R. *v.* Williams, in 1797, for publishing Paine's 'Age of Reason,' in which the authority of the Old and New Testament was denied, and the prophets and Christ were ridiculed. The same doctrine has been fully recognised in other cases,

(*o*) Forbes *v.* Cochrane (1824), 2 B. & C. 448; 3 D. & R. 679.

(*p*) Santos *v.* Illidge (1859), 8 C. B. N. S. 861; 29 L. J. C. P. 348.

one of the latest, perhaps, being that of Carlile (3 B. & Ald. 161), who, in 1820, was sentenced to pay a fine of £1,500, to be imprisoned for three years, and to find sureties for his good behaviour during life.

"But, besides the common law, the Legislature itself has made certain provisions against this kind of offence. The statute 1 Edw. 6, c. 1, for example, enacts that persons reviling the sacrament of the Lord's Supper by contemptuous words or otherwise shall suffer imprisonment. By 1 Eliz. c. 2, again, if any minister shall speak anything in derogation of the Book of Common Prayer, he shall be punishable, as there mentioned, by imprisonment and loss of benefice. So, also, by 3 Jac. 1, c. 21, whoever shall use the name of the Holy Trinity profanely or jestingly in any stage-play or show, is made liable to a fine of £10. Lastly, by 9 & 10 Will. 3, c. 30, it is enacted that, if any person educated in, or having made profession of, the Christian religion, shall by writing, teaching, or advised speaking, assert that there are more gods than one, or deny the Christian religion to be true, or the Scriptures to be of Divine authority, he shall, upon the first offence, be incapable of holding any office or trust; and on the second conviction shall be for ever incapable to bring any action, or to bear any office or benefice, and further shall suffer imprisonment for three years. It has been held, moreover, that the effect of this enactment is cumulative, and that an offender against it is still punishable at the common law."

Reg. *v.* Ramsay and Foote.

In the case of Reg. *v.* Ramsay and Foote (*q*), where the defendants were indicted for the publication of blasphemous libels in a newspaper called the *Freethinker*, the jury were directed that a blasphemous libel did not consist in an honest denial of the truths of the Christian religion, but in "a wilful intention to pervert, insult, and mislead others by means of licentious and contumelious abuse applied to sacred subjects." The summing up by Lord Coleridge, C. J., though the law may not be altogether sound, is an admirable specimen of judicial eloquence, and deserves attention. "It is no longer true," he said in the course of that address, "in the sense in which it was true when these dicta were uttered, that Christianity is part of the law of the land. . . . . To base the prosecution of a bare denial of the truth of Christianity *simpliciter* and *per se* on the ground that Christianity is part of the law of the land, in the sense in which it was said to be so by Lord Hale, and Lord Raymond, and Lord Tenterden, is in my judgment a mistake. It is to forget that law grows, and that, though the principles of law remain un-

(*q*) (1883), 48 L. T. 733; 15 Cox, C. C. 231.

changed, yet (and it is one of the advantages of the common law) their application is to be changed with the changing circumstances of the times. Some persons may call this retrogression; I call it progression of human opinion. Therefore, to take up a book or a paper, to discover merely that in it the truth of Christianity is denied without more, and therefore to say that now a man may be indicted upon such denial as for a blasphemous libel is, as I venture to think, absolutely untrue. I, for one, positively refuse to lay that down as law, unless it is authoritatively so declared by some tribunal I am bound by" (*r*).

Omichund v. Barker.

It was formerly supposed that persons not professing the Christian faith were incompetent as witnesses. In Omichund *v.* Barker (*s*), however, it was settled that it was not so much a belief in Christianity as a belief in a God that was required from a witness; and the depositions of witnesses professing the Gentoo religion, who were sworn according to the ceremonies of their religion, taken under a Commission out of Chancery, were admitted to be read in evidence. But many persons were found who, though quite competent as witnesses, objected altogether, on religious grounds, to taking oaths; and Acts of Parliament had to be passed relieving them from the necessity of doing so, and permitting them to make affirmations instead (*t*). These Acts, however, did not meet the case of an atheist, who, though quite willing to take an oath, might be objected to as incompetent. But now, by 32 & 33 Vict. c. 68, s. 4, such a person may, "if the presiding judge is satisfied that the taking of an oath would have no binding effect on his conscience," give evidence on his making a solemn promise to tell the truth.

Atheists as witnesses.

Jews as M.P.

That "Christianity is part of the law of England" has also been painfully proved by the difficulties thrown in the way of Jews who desired to sit in the House of Commons. In Miller *v.* Salomons (*u*) it was held that the words "upon the true faith of a Christian" were not a mere form of swearing, but an essential part of the oath of abjuration required by 6 Geo. 3, c. 53; so that Jews were effectually excluded from sitting and voting. In 1858, after a

(*r*) This passage, however, contained (as the "Law Times" for May 5th, 1883, very truly says) "a most dangerous principle," and shows that "judicial claims, not to expound, but to make law to suit the times, must be watched so as to avoid the danger of infringing on the province of the Legislature."

(*s*) (1744), Willes, 538; 1 Atkyn, 21.

(*t*) See 17 & 18 Vict. c. 125, s. 20 (civil cases); and 24 & 25 Vict. c. 66 (criminal cases).

(*u*) (1853), 7 Ex 475; 8 Ex. 779. See also Att.-Gen. *v.* Bradlaugh (1885), 14 Q. B. D. 667; 54 L. J. Q. B. 205, as to persons having no belief in a Supreme Being.

long and acrimonious struggle, a modification of the oath in favour of Jews was effected (*x*), and since that time they have frequently sat in Parliament with credit to themselves and benefit to the country.

Cremation. Cremation is illegal according to the common law, the Christian method of disposing of the dead being by burial (*y*). The Cremation Act, 1902 (2 Edw. 7, c. 8), has, however, sanctioned cremation subject to the provisions and regulations there laid down. It should be observed that the Act expressly provides that "Nothing in this Act shall interfere with the jurisdiction of any coroner under the Coroners Act, 1887 (*z*), or any Act amending the same, and nothing in this Act shall authorize the burial authority or any person to create or permit a nuisance" (sect. 10); and an incumbent shall not be obliged to perform the burial service before, at, or after cremation (sect. 11).

Simony. Simony (so called, it is said, in allusion to Simon the Sorcerer, who "offered them money" (Acts viii. 18)) may be mentioned in this connection. The leading case on the subject is Fox *v.* The Bishop of Chester (*a*), where it was held that the sale of the next presentation to a living (Wilmslow) was not necessarily bad under 31 Eliz. c. 6, because the incumbent was dying. But it would have been if the purchaser had intended to present a particular clergyman, or if the living had been actually vacant at the time of the contract. It is also simony for a clergyman to buy the next presentation, and get himself presented to the living (*b*). A modern

Mosse *v.* Killick. case on simony is Mosse *v.* Killick (*c*), where the plaintiff, who was the incumbent and patron of a living in Yorkshire, put the rectory into repair and, with the sanction of his bishop, let it to a tenant for a certain period. Before the termination of the tenancy the plaintiff resigned the living and presented the defendant to it. The presentation was made on the understanding and agreement that the defendant should, in consideration of having received the benefit of the repairs, hand over to the plaintiff any rent he received in respect of the tenancy between the date of the presentation and the termination of the tenancy. It was held that this was a simoniacal

(*x*) 21 & 22 Vict. cc. 48, 49.

(*y*) Williams *v.* Williams (1882), 46 L. T. N. S. 275; and see R. *v.* Stephenson (1884), 13 Q. B. D. 331; 53 L. J. M. C. 176; R. *v.* Price (1884), 12 Q. B. D. 247; 53 L. J. M. C. 51; where it was held that to burn a dead body, instead of burying it, is not a misdemeanor, unless it is so done as to amount to a public nuisance, or to prevent a coroner holding an inquest.

(*z*) 50 & 51 Vict. c. 71.

(*a*) (1829), 6 Bing. 1; 3 Bligh, N. S. 123.

(*b*) Winchcombe *v.* Bp. of Winchester (1617), Hob. 165.

(*c*) (1881), 50 L. J. Q. B. 300; 44 L. T. 149.

agreement, and the presentation thereof void under 31 Eliz. c. 6. In order to punish the offence of simony, recourse must be had to the Church Discipline Act, 1840 (*d*), and proceedings cannot be taken under the Clergy Discipline Act, 1892 (*e*). Church Discipline Act, 1840.

And reference should now be made on the subject of the sale of advowsons to the Benefices Act, 1898 (*f*), which has materially altered the law, and greatly restricted the right to effect such sales. Benefices Act, 1898.

Resignation bonds (*i.e.*, engagements by persons presented to livings to resign at some future period) were formerly void; and general resignation bonds are so still. But 9 Geo. 4, c. 94, now enables a clergyman, before being presented, to bind himself to resign in favour of some specified person. If the bond is made in favour of *two* persons, each of them must be, either by blood or marriage, a near relation of the patron. Resignation bonds.

Sabbath-breaking.

SCARFE *v.* MORGAN. (1838) [50]

[4 M. & W. 270; 1 H. & H. 292.]

The defendant was a farmer, and circulated a printed card to the effect that a certain horse of his would be ready to receive mares on Sundays. Scarfe (who had before had dealings with Morgan) sent a mare to be covered. Some difficulty arising about payment, Morgan refused to give up the mare until all his demands were satisfied, and Scarfe brought this action of trover. One of Scarfe's main points was that the contract was illegal as having been made on Sunday. The point, however, was overruled, chiefly on the ground that *the farmer's allowing the stallion to cover mares was not trading in the*

(*d*) 3 & 4 Vict. c. 86.

(*e*) 55 & 56 Vict. c. 32. See Beneficed Clerk *v.* Lee, [1897] A. C. 226; 66 L. J. P. C. 8.

(*f*) 61 & 62 Vict. c. 48.

course of his ordinary calling, to which alone the statute referred.

Act of Charles II.

Contracts made on Sunday are unlawful under 29 Car. 2, c. 7, which provides that "no tradesman, artificer, workman, labourer, or other person whatsoever shall do or exercise any worldly labour, business, or work of their ordinary callings upon the Lord's Day, or any part thereof, works of necessity and charity only excepted" (*g*), the intention of the Act being, as a judge said in 1826, "to advance the interests of religion, to turn a man's thoughts from his worldly concerns, and to direct them to the duties of piety and religion"; and his lordship adds that "the Act cannot be construed according to its spirit unless it is so construed as to check the career of worldly traffic" (*h*). Attention should be directed to the following points:—

"Or other person whatsoever."

(1.) The words "or other person whatsoever"—on the principle that general words are to be narrowed down by particular words which precede them—have been interpreted to mean "or other person whatsoever *of the 'tradesman, artificer, workman, or labourer' class.*"

Farmers.

On this construction it may be remarked that, since Scarfe *v.* Morgan was decided, it has been held that a farmer does not come within the description "or other person whatsoever," as just explained, so that the decision ought to have been in Morgan's favour on a different ground and at an earlier period (*i*).

"Of their ordinary callings."

(2.) To make the contract void, it *must have been made within the person's "ordinary calling."* For example, while the sale of a horse on Sunday *by a horse-dealer* would be void, such a sale *by an ordinary person*, though within the specified classes, would not be (*k*). So, the hiring of a labourer by a farmer (*l*), a guarantee given for the faithful services of a commercial traveller (*m*), and an attorney's agreement (on which he made himself personally liable) for settling the affairs of a client (*n*) have been held not to be vitiated by the contracts having been entered into on Sunday.

(*g*) "Every person being of the age of fourteen years or upwards offending in the premises shall for every such offence forfeit the sum of 5*s*."

(*h*) Fennell *v.* Ridler (1826), 5 B. & C. 406; 8 D. & R. 204. See, however, Lord Kenyon's remarks in R. *v.* Younger (1793), 5 T. R. 451; 2 R. R. 638.

(*i*) R. *v.* Silvester (1863), 33 L. J. M. C. 79; 10 Jur. N. S. 360; and see Sandiman *v.* Breach (1827), 7 B. & C. 96; 9 D. & R. 796, where it was held that the Act did not apply to a stage coachman.

(*k*) Drury *v.* De Fontaine (1808), 1 Taunt. 131.

(*l*) R. *v.* Whitnash (1827), 7 B. & C. 596; 1 M. & R. 452.

(*m*) Norton *v.* Powell (1842), 4 M. & G. 42.

(*n*) Peate *v.* Dicken (1834), 1 C. M. & R. 422.

(3.) To make the contract void, it *must be complete on Sunday.* If, however, a contract of sale (*e.g.*, of goods of the value of £10) is *concluded* on Sunday, it will not be purged of its taint merely because the goods are not delivered, nor any part of the price paid, till a subsequent week-day (*o*). Must be complete.

In a case in which a Scotch boy, apprenticed to a barber, declined to shave his master's customers on Sunday, it was held by the House of Lords that shaving is not "a work of necessity and charity" within the exception of the Act (*p*). "It was said in the Court below," remarked Lord Brougham, "that unless working persons, who do not themselves shave their beards, were allowed to resort to the barbers' shops on Sundays, many decently disposed men would be prevented from frequenting places of worship, and from associating with their families or friends, from want of personal cleanliness. *But why should they not do the work on Saturday?*" Sunday shaving.

In the recent case, however, of Palmer *v.* Snow (*q*) the Divisional Court held that a hairdresser was not a "tradesman, artificer, &c." within the meaning of the Act.

Meat, milk, mackerel, and bread are to a great extent excepted from the operation of the Act. Provisions.

By the Sunday Observance Prosecution Act, 1871 (*r*), no prosecution can be instituted for any offence under the Sunday Observance Act, 1676 (29 Car. 2, c. 7), except by or with the consent in writing of the chief officer of police of the police district in which the offence is committed, or with the consent of magistrates. And a prosecution is "instituted" when the information is laid (*s*). Sunday Observance Prosecution Act, 1871.

The Factory and Workshop Act, 1878 (41 & 42 Vict. c. 16), contains various provisions forbidding the employment of young persons and women in workshops on Sunday, but making certain exceptions in the case of persons of the Jewish religion (*t*). Factory and Workshop Act, 1878.

21 Geo. 3, c. 49, provides that any house opened for public amusement or debate on Sunday, to which persons are admitted by payment of money, shall be deemed a disorderly house, and the Sunday amusements.

(*o*) Bloxsome *v.* Williams (1824), 3 B. & C. 232; 1 C. & P. 294; and Simpson *v.* Nicholls (1838), 3 M. & W. 240; 1 H. & H. 12.

(*p*) Phillips *v.* Innes (1837), 4 Cl. & F. 234; 42 R. R. 19.

(*q*) [1900] 1 Q. B. 725; 69 L. J. Q. B. 356.

(*r*) 34 & 35 Vict. c. 87. See Rex *v.* Mead, [1902] 2 K. B. 212; 71 L. J. K. B. 871; where it was held that this Act has no application to prosecutions under sect. 16 of the Bread Act, 1822. See also 6 & 7 Will. 4, c. 37; and 47 & 48 Vict. c. 43, s. 8.

(*s*) Thorpe *v.* Priestnall, [1897] 1 Q. B. 159; 66 L. J. Q. B. 248.

(*t*) See sects. 21, 50, and 51. See also Goldstein *v.* Vaughan, [1897] 1 Q. B. 519; 66 L. J. Q. B. 380.

keeper (*u*) of it shall forfeit £200 for every Sunday it is so used. A place where sacred music is performed, and an instructive address of a religious or, at all events, neutral, character given, has been held not to be within the statute (*x*), but an aquarium, notwithstanding sacred music and real fish, is (*y*).

Lien—general and particular.

The leading case is also an authority on the law of lien, it having been held that the owner of a stallion has a lien on a mare sent to be covered. Independently of agreement (by which a lien may, of course, exist, or be dispensed with where it would otherwise exist), liens in law are of two kinds, *particular* and *general*.

If I am a watchmaker, and you send me your watch to mend, the right that I have to keep it till you pay for its mending is a *particular* lien. Such a lien exists over all goods on which the person claiming the lien has bestowed unpaid-for time and trouble, and, very reasonably, is favoured by the law. But no charge can be made for warehousing (*z*).

General liens are liens in respect of a general balance due. They are not favoured by the law, and exist only by virtue of agreement, or custom, or the previous dealings of the parties. Solicitors, bankers (*a*), wharfingers, factors, stockbrokers (*b*), insurance brokers, and, it is said, common carriers (*c*), have general liens.

Solicitor's lien.

The lien of a solicitor is important enough to deserve a word of special notice. A solicitor has a lien for his professional charges on all deeds and documents of his clients that come properly into his possession, and also on money recovered, litigiously or by compromise, in the cause. But, when required to produce a document under a *subpœna duces tecum*, he cannot refuse to do so merely because it has not been paid for and he claims a lien on it (*d*). Nor does his lien extend to alimony *pendente lite* paid over to him as

(*u*) As to who is "the keeper," see the recent case of Reid *v.* Wilson, [1895] 1 Q. B. 315; 64 L. J. M. C. 60.

(*x*) Baxter *v.* Langley (1868), L. R. 4 C. P. 21; 38 L. J. M. C. 1.

(*y*) Terry *v.* Brighton Aquarium Co. (1875), L. R. 10 Q. B. 306; 44 L. J. M. C. 173.

(*z*) Bruce *v.* Everson (1883), 1 C. & E. 18; British Empire Shipping Co. *v.* Somes (1860), 30 L. J. Q. B. 229; 8 H. L. C. 338.

(*a*) Lond. Chart. Bank of Australia *v.* White (1879), 4 App. Cas. 413; and see Leese *v.* Martin (1873), L. R. 17 Eq. 224; 43 L. J. Ch. 193; *In re* Bowes, Strathmore *v.* Vane (1886), 36 Ch. D. 586; 56 L. J. Ch. 143.

(*b*) *In re* London and Globe Finance Corporation, [1902] 2 Ch. 416; 71 L. J. Ch. 893; following Jones *v.* Peppercorne (1858), 28 L. J. Ch. 158; Johns. 430.

(*c*) Rushforth *v.* Hadfield (1806), 7 East, 224; Aspinall *v.* Pickford (1800), 3 Bos. & P. 44; Stevens *v.* Biller (1883), 25 Ch. D. 31; 53 L. J. Ch. 249; Webb *v.* Smith (1885), 30 Ch. D. 192; 55 L. J. Ch. 343 (in which an auctioneer's lien is discussed).

(*d*) Fowler *v.* Fowler (1881), 50 L. J. Ch. 686.

such, unless he holds the wife's written authority to him to receive it as her agent (*e*). But by 23 & 24 Vict. c. 127, s. 28, the Court before which any proceedings come may order the solicitor's costs to be made a charge on the property recovered (*f*). In Boughton *v.* Boughton (*g*), it was held that a solicitor could not assert his lien in such a way as to embarrass the proceedings in the suit. But a solicitor by whose instrumentality a judgment for payment of a sum of money is obtained is not the less entitled to a lien on the money for his costs because he ceased to be the solicitor before the trial (*h*). Where successive solicitors are employed in an action, and the fund in Court is insufficient for payment of all the costs, the solicitor who conducts the cause to its conclusion is entitled to be paid first, and the solicitor who was next previously employed is entitled to be paid next, and so on throughout, the latest in order of employment being entitled to priority; and it is immaterial that the previously employed solicitors may have obtained charging orders for their costs (*i*).

As to an Innkeeper's lien, see *post*, p. 301.

Wagering Contracts.

DIGGLE *v.* HIGGS. (1877) [51]

[2 Ex. Div. 422; 46 L. J. Ex. 721.]

A couple of athletes named Simmonite and Diggle agreed to have a walking race at the Higginshaw Grounds, Oldham, for £200 a side, Perkins to be referee, and Higgs

(*e*) Cross *v.* Cross (1880), 43 L. T. 533.

(*f*) See *In re* Born, Curnock *v.* Born, [1900] 2 Ch. 433; 69 L. J. Ch. 669; Wright *v.* Sanderson, [1901] 1 Ch. 317; 70 L. J. Ch. 119; and Ridd *v.* Thorne, [1902] 2 Ch. 344; 71 L. J. Ch. 624.

(*g*) (1883), 23 Ch. Div. 169; 48 L. T. 413; and see *Re* Galland (1885), 53 L. T. 921; 31 Ch. D. 296; *In re* Capital Fire Insurance Association (1883), 24 Ch. D. 408; 53 L. J. Ch. 71; *In re* Carter (1885), 55 L. J. Ch. 230; 53 L. T. 630; Boden *v.* Hensby, [1892] 1 Ch. 101; 61 L. J. Ch. 174.

(*h*) *In re* Wadsworth (1885), 29 Ch. D. 517; 54 L. J. Ch. 638.

(*i*) *In re* Knight, Knight *v.* Gardner, [1892] 2 Ch. 368; 61 L. J. Ch. 399; following *In re* Wadsworth (1886), 34 Ch. D. 155; 56 L. J. Ch. 127.

final stakeholder and pistol-firer. The match duly came off, and Perkins decided that Simmonite had won. This decision would seem not to have met the approval of Diggle, who gave Higgs formal notice not to pay over the stakes to Simmonite, and demanded back his £200. In spite of this notice, Higgs paid Simmonite the whole £400, and became the defendant in this action.

For the plaintiff it was contended that the agreement was a wager, and therefore that he *had a right to demand back the sum deposited by him before it was paid over.* The defendant, on the other hand, said that the agreement came within the proviso of 8 & 9 Vict. c. 109, s. 18, which rendered lawful "a subscription or contribution for a sum of money to be awarded to the winner of a lawful game," and relied on a case of Batty *v.* Marriott (*k*), where it was held that a foot-race came within the proviso.

The judges, however, overruled that case, and gave Diggle back his money.

Wagers generally enforceable at common law.

At common law wagers, not being indecent, or contrary to public policy, or hurtful to the feelings of third parties, could be enforced by action. But wagers as to the sex of a person (*l*), as to the issue of a criminal trial (*m*), as to whether an unmarried woman would have a child before a certain time (*n*), or as to the result of a parliamentary election (*o*), were held to be unlawful. And, even when the subject-matter of a wager was quite innocent, if it were of a very frivolous character, the judges would sometimes, in an arbitrary fashion, refuse to try the case. It seems also that at common law contracts by way of gaming were lawful (*p*). But in 1845, after previous efforts in the same direction, the Legislature enacted (*q*) "that all contracts or agreements, whether by parol or in writing,

Act of 1845.

(*k*) (1848), 5 C. B. 818; 17 L. J. C. P. 215.

(*l*) De Costa *v.* Jones (1778), Cowp. 729.

(*m*) Evans *v.* Jones (1839), 5 M. & W. 77; 2 H. & H. 67; and see Gilbert *v.* Sykes (1812), 16 East, 150; 14 R. R. 327; Atherfold *v.* Beard (1788), 2 T. R. 610; 1 R. R. 556; Good *v.* Elliott (1789), 3 T. R. 693; 1 R. R. 803.

(*n*) Ditchburn *v.* Goldsmith (1815), 4 Camp. 152.

(*o*) Allen *v.* Hearn (1785), 1 T. R. 56; 1 R. R. 149.

(*p*) Sherbon *v.* Colebach (1687), 2 Vent. 175.

(*q*) 8 & 9 Vict. c. 109, s. 18.

by way of gaming or wagering, shall be null and void; and that no suit shall be brought or maintained in any Court of law or equity for recovering any sum of money or valuable thing alleged to be won upon any wager, *or which shall have been deposited in the hands of any person to abide the event on which any wager shall have been made:* provided always, that this enactment shall not be deemed to apply to any subscription or contribution, or agreement to subscribe or contribute, for or towards any plate, prize, or sum of money to be awarded to the winner or winners of any lawful game, sport, pastime, or exercise." The words italicised might at first sight seem fatal to a claim like Diggle's; but it had been expressly held in a previous case that they did not prevent a person from claiming back *his own* deposit at any time before it was paid over to his adversary, and on repudiating the wager (*r*). And it has been decided that sect. 18 of the Act of 1845 applies to deposits in the hands of one of the parties to the wager, as well as deposits in the hands of third persons; but the deposit cannot be recovered if it has been duly appropriated by the depositee before the repudiation of the transaction by the depositor (*s*).

Recovering deposit.

The intention of the Act, it has been held, is to strike not merely at wagering on *unlawful* games, but at wagering even on *lawful* games (*t*).

Wagering on lawful games.

Hampden *v.* Walsh (*u*) is an authority to the same effect as Diggle *v.* Higgs. A person named Hampden got it into his head that it was a popular error to suppose the world was round, and advertised a challenge in the newspapers to any scientific man to prove it, each side to deposit £500 to abide the issue. The challenge was accepted by a Mr. Wallace, and the money duly placed in the hands of the defendant as stakeholder. Experiments were then made on the Bedford Level Canal, and eventually, of course, the

Is the world really round?

(*r*) Varney *v.* Hickman (1847), 5 C. B. 271; 17 L. J. C. P. 102; Martin *v.* Hewson (1851), 10 Ex. 737; 24 L. J. Ex. 174; Savage *v.* Madder (1866), 36 L. J. Ex. 178; 16 L. T. 600; and see Strachan *v.* Universal Stock Exchange, Limited (No. 1), [1896] A. C. 166; 65 L. J. Q. B. 428; *In re* Cronmire, *Ex parte* Waud, [1898] 2 Q. B. 383; 67 L. J. Q. B. 620; *In re* Gieve, [1899] 1 Q. B. 794; 68 L. J. Q. B. 509; and Shoolbred *v.* Roberts, [1900] 2 Q. B. 497; 69 L. J. Q. B. 800.

(*s*) Strachan *v.* Universal Stock Exchange, Limited (No. 2), [1895] 2 Q. B. 697; 65 L. J. Q. B. 178; following Manning *v.* Purcell (1855), 7 De G. M. & G. 55; 24 L. J. Ch. 522.

(*t*) Parsons *v.* Alexander (1855), 5 E. & B. 263; 24 L. J. Q. B. 277; Thorpe *v.* Coleman (1845), 1 C. B. 990; 14 L. J. C. P. 260; Martin *v.* Smith (1838), 4 Bing. N. C. 436; 6 Scott, 268; Whaley *v.* Pajot (1799), 2 B. & P. 51; Ximenes *v.* Jaques (1775), 6 T. R. 499; 1 Esp. 311.

(*u*) (1876), 1 Q. B. D. 189; 45 L. J. Q. B. 238. See also Trimble *v.* Hill (1879), 5 App. Cas. 342; 49 L. J. P. C. 49.

referee decided in favour of rotundity. Walsh then gave Hampden notice that he should pay over the money to Wallace. Hampden objected, and demanded back his money, which, however, Walsh proceeded to pay to Wallace. In an action against him for having done so, it was held that Hampden was entitled to recover his deposit, the affair being a mere wager.

No action can be maintained by A. against B. on a wager, in which A. bets B. that B. will, and B. that he will not, pass his examination as a solicitor, for B. has the power of determining the wager in his own favour (*x*).

"Null and void."

Although wagers are "*null and void*," they are not absolutely *illegal*. Thus, if a man lost a wager, and got another to pay the money for him, until recently an action would lie for the recovery of the money so paid (*y*). And so if A. requested B. to make a bet for him with C. on a particular horse, and then, after B. had done so, the horse lost, B. might, notwithstanding the statute, have recovered from A. the money he had had to pay C. (*z*).

Gaming Act, 1892.

The law on this point, however, was altered by the Gaming Act, 1892 (*a*), which provides that "any promise, express or implied, to pay any person any sum of money paid by him under or in respect of any contract or agreement rendered null and void by 8 & 9 Vict. c. 109, or to pay any sum of money by way of commission, fee, reward, or otherwise in respect of any such contract, or of any services in relation thereto or in connection therewith, shall be null and void, and no action shall be brought or maintained to recover any such sum of money." The following cases, decided since the passing of this Act, should be referred to:—Tatam *v.* Reeve (*b*), which held that the Act prevents A., who has, at B.'s request, paid money in settlement of lost bets, from recovering the money from B., even though A. was no party to the betting; De Mattos *v.* Benjamin.

Tatam *v.* Reeve.

De Mattos *v.* Benjamin.

(*x*) Fisher *v.* Waltham (1843), 4 Q. B. 889; 12 L. J. Q. B. 330.

(*y*) Rosewarne *v.* Billing (1816), 33 L. J. C. P. 55; 15 C. B. N. S. 316; and see Read *v.* Anderson (1884), 13 Q. B. D. 779; 53 L. J. Q. B. 532; Bridger *v.* Savage (1885), 15 Q. B. D. 363; 54 L. J. Q. B. 464; Britton *v.* Cook (1887), W. N. 116; Cohen *v.* Kittell (1889), 22 Q. B. D. 680; 58 L. J. Q. B. 241.

(*z*) Read *v.* Anderson, *ubi sup.*

(*a*) 55 Vict. c. 9. It was decided in Knight *v.* Lee, [1893] 1 Q. B. 41; 62 L. J. Q. B. 28, that this Act is not retrospective, and, therefore, a betting agent can recover moneys due to him before the Act, though the action is not commenced until after that date. In County Courts a defence under this Act is a "statutory defence" of which notice must be given: Willis *v.* Lovick, [1901] 2 K. B. 195; 70 L. J. K. B. 656.

(*b*) [1893] 1 Q. B. 44; 62 L. J. Q. B. 30; and see Carney *v.* Plimmer, [1897] 1 Q. B. 634; 66 L. J. Q. B. 415; and Saffrey *v.* Mayer, [1901] 1 K. B. 11; 70 L. J. K. B. 145.

Benjamin (*c*), which decided that the Act does not deprive a principal, employing an agent to make bets for him, of his right to recover from such agent any sums received by the agent on account of such bets; O'Sullivan *v.* Thomas (*d*), where money deposited by A. with B. as stakeholder, to abide the result of a race between A. and a third party, was held not to be money paid under a wagering contract within the meaning of the Act, and, therefore, recoverable by A. from B. before it had been paid over by B. to the third party; Shoolbred *v.* Roberts (*e*), where a bankrupt and one D. entered into an agreement to play a billiard match for £100 a side and deposited £100 each with a stakeholder to abide the result of the match. The bankrupt won the match, and the £200 was claimed both by him and his trustee in bankruptcy. D. making no claim to the stakes or any part thereof, the Court held that the trustee's claim prevailed.

O'Sullivan *v.* Thomas.

Shoolbred *v.* Roberts.

In Beeston *v.* Beeston (*f*) the plaintiff had paid the defendant money to invest for him in betting on horse races. The right horses won, and the defendant gave the plaintiff a cheque, which was afterwards dishonoured. In an action on the cheque the defence was raised that it was an attempt to enforce a contract prohibited by statute. It was held, however, that betting on horse races was not illegal in the sense of tainting any transaction connected with it. Beeston *v.* Beeston was distinguished in the later case of Higginson *v.* Simpson (*g*). There the plaintiff was a tipster, and gave the defendant "Regal" as the probable winner of the Grand National. It was agreed between them that the plaintiff should have £2 on "Regal" at 25 to 1 against the horse for that race; that is to say, that if the defendant backed "Regal" for the Grand National, and the horse won, the plaintiff was to have £50 out of the defendant's winnings, but if the horse lost, the plaintiff was to pay the defendant £2. Accordingly, the defendant backed "Regal," and it won. Ungrateful for his tip, however, he refused to pay the plaintiff the £50; and it was held that the money could not be recovered by action because the agreement was void within

Beeston *v.* Beeston.

A tip for the Grand National.

(*c*) (1894), 63 L. J. Q. B. 248; 70 L. T. 560.

(*d*) [1895] 1 Q. B. 698; 64 L. J. Q. B. 398; followed in Burge *v.* Ashley, [1900] 1 Q. B. 744; 69 L. J. Q. B. 538.

(*e*) [1900] 2 Q. B. 497; 69 L. J. Q. B. 800.

(*f*) (1876), 1 Ex. D. 13; 45 L. J. Ex. 230; *Ex parte* Pyke (1878), 8 Ch. D. 754; 47 L. J. Bk. 100; Seymour *v.* Bridge (1885), 14 Q. B. D. 460; 54 L. J. Q. B. 347; Perry *v.* Barnett (1885), 15 Q. B. D. 388; 54 L. J. Q. B. 466; but see Woolf *v.* Hamilton, [1898] 2 Q. B. 337; 67 L. J. Q. B. 917.

(*g*) (1877), 2 C. P. D. 76; 46 L. J. C. P. 192; but see Carlill *v.* Carbolic Smoke Ball Co., [1893] 1 Q. B. 256; 62 L. J. Q. B. 257.

8 & 9 Vict. c. 109, s. 18. So also money lent for the purpose of gaming cannot be recovered back (*h*). A recent illustration of this is to be found in the case of Carney *v.* Plimmer (*i*); the defendant, who had agreed to fight a boxing match for stakes to be deposited with a stakeholder by himself and the other combatant, requested the plaintiff to lend him the money for his stake; the plaintiff advanced the money upon the terms that if the defendant won he was to repay it, but that if he lost he was to be under no obligation to do so, and the money was deposited with the stakeholder; the defendant won the match and received the stakes, but refused to repay to the plaintiff the money lent, and it was held that he could not be compelled to do so. Whether a bond given simply to secure a racing debt is valid or not appears to be a doubtful point. In the well-known case of Bubb *v.* Yelverton (*k*), it was unnecessary to decide that question, because, as Lord Romilly, M. R., said, the bond was given, "not to pay racing debts, but *to avoid the consequences of not having paid them.*" It has been held that the business of a bookmaker on the turf not being illegal if carried on in a way which does not infringe the provisions of the Betting Act, 1853, a partner in such a business is entitled to an account and to payment of his share of the profits (*l*). But when the plaintiff and the defendant entered into partnership for the carrying on of a business of betting on horse-races, and the business resulted in a loss, which was paid by the plaintiff, an action claiming contribution in respect of such loss was recently held by the Court of Appeal not to be maintainable (*m*).

The ungrateful boxer.

Bubb *v* Yelverton.

Partners.

Though 8 & 9 Vict. c. 109, s. 18, does not expressly mention or allude to Stock Exchange transactions, it has been decided that agreements between buyers and sellers of shares and stocks to pay or receive the differences between their prices on one day and their prices on another day are gaming and wagering transactions within the meaning of the statute (*n*). And although the parties may formally agree that none but real purchases of stocks and shares are intended, still, if in fact there was no intention to purchase, but only to speculate in "differences," the transactions are void as being within the Gaming Act (*o*). But in Thacker *v.* Hardy the

Stock Exchange transactions.

(*h*) McKinnell *v.* Robinson (1838), 3 M. & W. 434; 1 H. & H. 146.

(*i*) [1897] 1 Q. B. 634; 66 L. J. Q. B. 415.

(*k*) (1870), L. R. 9 Eq. 471; 39 L. J. Ch. 428.

(*l*) Thwaites *v.* Coulthwaite, [1896] 1 Ch. 496; 65 L. J. Ch. 238.

(*m*) Saffery *v.* Mayer, [1901] 1 Q. B. 11: 70 L. J. K. B. 145.

(*n*) Grizewood *v.* Blane (1851), 11 C. B. 526.

(*o*) Universal Stock Exchange *v.* Strachan (No. 1), [1896] A. C. 166; 65 L. J. Q. B. 428. This case also

statute was held not to be a good answer to the claim of a broker employed by the defendant to speculate for him on the Stock Exchange for commission and an indemnity, the agreement being that the plaintiff should himself, as principal, enter into *real contracts of purchase and sale* with jobbers (*p*).

Betting houses.

The Betting Houses Act, 1853 (*q*), makes it unlawful to keep or use any "house, office, room, or other place" for betting. This Act, however, does not apply to a case where members of a *bonâ fide* club make bets with each other in the club (*r*). In Shaw *v.* Morley (*s*), it was held that a wooden structure, unroofed, on the Doncaster racecourse was an "office" and a "place" within the meaning of the statute. So a stool and big umbrella kept up, rain or no rain, is a "place" (*t*); and so even is a small moveable box (*u*).

Shaw *v.* Morley.

Powell *v.* Kempton Park Racecourse Co., Ltd.

But on this question reference should now be made to the judgments in the House of Lords in the recent case of Powell *v.* Kempton Park Racecourse Co., Ltd. (*x*), where it was held that Tattersall's Inclosure, *i.e.*, an uncovered inclosure of about a quarter of an acre, fenced in by iron rails, to which, when race-meetings were held, the public was admitted by the owners of the racecourse on payment of an entrance fee, and to which large numbers of professional bookmakers and backers regularly resorted and made bets, was not "a place opened, kept, or used" for the purposes prohibited by

decided, that securities deposited as "cover" for any balance that may be due on speculations in "differences" may be recovered back. See *ante*, p. 217; and see *In re* Gieve, [1899] 1 Q. B. 794; 68 L. J. Q. B. 509.

(*p*) (1878), 4 Q. B. D. 685; 48 L. J. Q. B. 289; approved in Forget *v.* Ostigny, [1895] A. C. 318; 64 L. J. P. C. 62: and see Universal Stock Exchange *v.* Stevens (1892, 66 L. T. 612; 40 W. R. 494.

(*q*) 16 & 17 Vict. c. 119; and see 37 Vict. c. 15; 36 & 37 Vict. c. 38. It was held in Pay *v.* Sims (1889) (58 L. J. M. C. 39; W. N. (1889) 9), that licensed victuallers may be convicted under the Betting Houses Act, 1853, s. 3, which is not, as regards them, repealed by the Licensing Act, 1872. And see Hornsby *v.* Raggett, [1892] 1 Q. B. 20; 61 L. J. M. C. 24; Ridgeway *v.* Farndale, [1892] 2 Q. B. 309; 61 L. J. M. C. 199; Reg. *v.* Preedy (1892), 17 Cox, C. C. 433; Bond *v.* Plumb, [1894] 1 Q. B. 169; 70 L. T. 405; and Belton *v.* Busby, [1899] 2 Q. B. 380; 68 L. J. Q. B. 859; followed in Tromans *v.* Hodkinson, [1903] 1 K. B. 30; 72 L. J. K. B. 21; and Rex *v.* Deaville, [1903] 1 K. B. 468; 72 L. J. K. B. 272. See also, *post*, p. 223, n. (*h*).

(*r*) See Downes *v.* Johnson, [1895] 2 Q. B. 203; 11 T. L. R. 426.

(*s*) (1868), L. R. 3 Ex. 137; 37 L. J. M. C. 105.

(*t*) Bows *v.* Fenwick (1874), L. R. 9 C. P. 339; 43 L. J. M. C. 107; Snow *v.* Hill (1885), 14 Q. B. D. 588; 46 L. J. M. C. 95.

(*u*) Gallaway *v.* Maries (1881), 8 Q. B. D. 275; 51 L. J. M. C. 53; Davis *v.* Stephenson (1890), 24 Q. B. D. 529; 59 L. J. M. C. 73.

(*x*) [1899] A. C. 143; 68 L. J. Q. B. 392; overruling Hawke *v.* Dunn, [1897] 1 Q. B. 579; 66 L. J. Q. B. 364.

the Act of 1853. The law on this point is, perhaps, most clearly explained in the following extracts from the judgment of Channell, J., in the recent case of Brown *v.* Patch (*y*):—"The law has now been fairly well settled by the decision of the House of Lords in the Kempton Park case. I think there is no difficulty in understanding what is the law and what is the interpretation of the statute; but there is considerable difficulty in applying it in particular cases. The statute seems clearly to be directed against betting *places*, not against betting *persons*. Clearly, also, it does not forbid persons using a place by going there and meeting and betting with each other. Nor does it forbid keeping a place where persons may meet and bet with each other. Nor does it forbid carrying on the business of betting with anyone who will bet with you. But it does forbid carrying on the business of keeping an office or place to which people may come and bet with you. The judgments in the case in the House of Lords clearly show that that is the matter to be considered. The important question is not so much, what is a place? but what is the character of the user of it? and although the words used are 'house, office, room, or other place,' and it is clear that, according to the ordinary rule, 'place' must be something *ejusdem generis* with 'house, office, room,' yet the analogy is with respect to the way the place is *used* rather than with respect to the way in which it is *constructed*. . . . If a man, as was done here, uses certain apparatus with his name on it, and a statement of the odds he is prepared to lay, that apparatus may be used only to indicate his identity, and that he is willing to bet with anybody who will bet with him. If the apparatus is used for these purposes only, it does not in any way localise his business of betting, or bring him within the provisions of the Act. But if it be used to indicate the place at which there is a man to be found who will bet with anyone who will come and bet with him there, then that apparatus becomes an extremely important and valuable matter to consider. In each case the facts must be looked at to see whether the bamboo stage, or the umbrella, or whatever it is that the man has got, is being used by him merely to indicate that he is prepared to bet with anybody who will bet with him, or whether he is using it to indicate that there is a place at which the business of betting is carried on by him, and to which, therefore, people can go for the purpose of betting with him."

Brown *v.* Patch.

(*y*) [1899] 1 Q. B. 892; 68 L. J. Q. B. 588. See also Reg. *v.* Humphreys, [1898] 1 Q. B. 875; 67 L. J. Q. B. 534; McInany *v.* Hildreth, [1897] 1 Q. B. 600; 66 L. J. Q. B. 376; and Liddell *v.* Lofthouse, [1896] 1 Q. B. 295; 65 L. J. M. C. 64.

The organiser of a sweepstakes on a horse race, to be subscribed for and drawn at his house, does not commit any offence under sect. 1 of the Act of 1853; because the subscriptions he receives are not moneys payable on the contingency of a horse race, but on the contingency of the drawing of the sweepstakes (*z*). Sweepstakes.

The payment of bets which have been previously made does not, of itself, constitute "betting" within the Act of 1853; and, therefore, a person who uses a house for paying bets which he has previously made elsewhere does not, by the mere payment of such bets in that house, commit an offence under sect. 3 of the Act (*a*).

The Betting Act, 1874 (*b*), is supplementary to the Act of 1853, and is confined to such bets as are mentioned in the earlier Act. For this reason it was held in Cox *v.* Andrews (*c*), that it did not apply to advertisements offering information for the purpose of bets not to be made in any house, office, or place kept for that purpose.

Playing skittle pool for money in places licensed for the sale of intoxicating liquors is "gaming" within sect. 17 of the Licensing Act, 1872 (*d*). But to play "progressive whist" for prizes, not subscribed for by the players but given by third persons, has recently been held not to amount to gaming within the meaning of this section (*e*). Skittle pool. The Filey Whist Drive.

Lotteries are prohibited by 10 & 11 Will. 3, c. 17, and other statutes, and declared to be public nuisances (*f*). By 42 Geo. 3, c. 119, s. 2, it is made an offence to keep any office or place to exercise any lottery not authorized by Parliament. A man who erected a tent at Darlington, and sold packets of tea containing coupons for prizes, was held to have broken this statute (*g*). Lotteries.

The case of Barclay *v.* Pearson (*h*) is an important decision under The "missing

(*z*) Reg. *v.* Hobbs, [1898] 2 Q. B. 647; 67 L. J. Q. B. 928.

(*a*) Bradford *v.* Dawson, [1897] 1 Q. B. 307; 66 L. J. Q. B. 191.

(*b*) 37 Vict. c. 15.

(*c*) (1883), 12 Q. B. D. 126; 53 L. J. M. C. 34; but see Reg. *v.* Brown, [1895] 1 Q. B. 119; 64 L. J. M. C. 1; where it was held that the offence of keeping a house for the purpose of betting with persons resorting thereto may be proved by showing that the house was opened and advertised as a betting house, although no person ever physically resorted thereto. But where no other evidence than that of resorting is offered, there must be evidence of a physical resorting, and it is not sufficient to show that letters and telegrams were sent to the accused directing him to make bets with the senders; and persons sending such letters and telegrams do not "resort" to the house.

(*d*) Dyson *v.* Mason (1889), 22 Q. B. D. 351; 58 L. J. M. C. 55.

(*e*) Lockwood *v.* Cooper, [1903] 2 K. B. 428.

(*f*) See Allport *v.* Nutt (1845), 1 C. B. 974; 14 L. J. C. P. 272; R. *v.* Buckmaster (1887), 20 Q. B. D. 182; 57 L. J. M. C. 25.

(*g*) Taylor *v.* Smetten (1883), 11 Q. B. D. 207; 52 L. J. M. C. 101; and see Barratt *v.* Burden (1894), 63 L. J. M. C. 33; 10 R. 602.

(*h*) [1893] 2 Ch. 154; 62 L. J.

"word" competition.

this Act. There, the proprietor of a paper conducted competitions in the following manner:—A sentence was inserted in the paper with one word missing; intending competitors were required to cut out a coupon attached to the paper, to write the missing word on the coupon, and send it, together with a fee of 1*s.* for each coupon, to the proprietor. The missing word was decided upon before the commencement of the competition. The entrance fees were divided amongst the successful competitors. It was held that this competition constituted a lottery within the meaning of 42 Geo. 3, c. 119, and also that the competitors had a right to the return of their contributions, at all events, provided that they gave notice of their claim before the money had been distributed by the proprietor. In the more recent case of Hall *v.* Cox (*i*) the defendant published a newspaper containing an offer of a money prize for a correct prediction of the number of births and deaths in London during a named week. Competitors, who were not limited to one prediction, were to fill in the predicted numbers on coupons which were published in the issue of the paper which contained the offer. It was held by the Court of Appeal, that the competition, not being one the result of which depended entirely on chance, was not a lottery.

Art Union lotteries, constituted as provided by 9 & 10 Vict. c. 48, are allowable.

Gaming in public places.

The Vagrant Act Amendment Act, 1873 (*k*), imposes penalties on persons gaming, &c. in public places. *A railway carriage while travelling on its journey* is "an open and public place to which the public have or are permitted to have access" within the Act (*l*).

Bye-laws.

As to the validity of bye-laws made by public authorities in restraint of betting, the following recent cases may be consulted, namely: Jones *v.* Walters (1898), 78 L. T. 265; 62 J. P. 326; Kitson *v.* Ashe, [1899] 1 Q. B. 425; 68 L. J. Q. B. 286; White *v.*

Ch. 636. But see Caminada *v.* Hulton, or Reg. *v.* Hulton (1891), 60 L. J. M. C. 116; 64 L. T. 572; where it was held that advertisements in a paper offering prizes for those who selected winning horses, did not amount to a lottery within sect. 41 of the Lottery Act, 1823; and Stoddart *v.* Sagar, [1895] 2 Q. B. 474; 64 L. J. M. C. 234. But these cases, and also Reg. *v.* Hobbs, *supra*, were distinguished in Reg. *v.* Stoddart, [1901] 1 K. B. 177; 70 L. J. K. B. 189; which was followed in Hawke *v.* MacKenzie, [1902] 2 K. B. 225; 71 L. J. K. B. 565; disapproving Stoddart *v.* Argus Printing Co., [1901] 2 K. B. 470; 70 L. J. K. B. 711. See also Lennox *v.* Stoddart; Davis *v.* Stoddart, [1902] 2 K. B. 21; 71 L. J. K. B. 747.

(*i*) [1899] 1 Q. B. 198; 68 L. J. Q. B. 167.

(*k*) 36 & 37 Vict. c. 38, s. 3. See Lester *v.* Quested (1901), 85 L. T. 487; 50 W. R. 207.

(*l*) Langrish *v.* Archer (1882), 10 Q. B. D. 44; 52 L. J. M. C. 47.

Morley, [1899] 2 Q. B. 34; 68 L. J. Q. B. 702; and Thomas *v.* Sutters, [1900] 1 Ch. 10; 69 L. J. Ch. 27.

Baccarat.

In Jenks *v.* Turpin (*m*), the game of "baccarat" was held to be unlawful within sect. 4 of 17 & 18 Vict. c. 38; and it was laid down by Hawkins, J., that to constitute "unlawful gaming" it is not necessary that the games played shall be unlawful games, but that it is enough that the play is carried on in a "common gaming-house." And this case was recently followed (*n*), where the game of "chemin de fer" was held to be merely a form or variety of baccarat. And it should be observed that the question, whether a particular game falls within the category of unlawful games, is one for the Court and not for the jury (*o*).

"Chemin de fer."

Inciting infants to bet.

The Betting and Loans (Infants) Act, 1892 (*p*), renders penal the inciting of infants to betting or wagering, or to borrowing money.

Impossible Contracts.

TAYLOR *v.* CALDWELL. (1863) [52]

[3 B. & S. 826; 32 L. J. Q. B. 164.]

Caldwell agreed to let Taylor have the Surrey Gardens and Music Hall at Newington for four specified summer nights, on which Taylor proposed to entertain the British public with bands, ballets, aquatic sports, fireworks, and other festivities. Unfortunately, before these summer nights arrived, Caldwell's premises were destroyed by an accidental fire. Taylor had been put to great expense in preparing for his entertainment, and he submitted that, as the contract was an absolute one, Caldwell must pay damages for the breach. It was held, however, that the parties *must be taken to have contracted on the basis of the*

(*m*) (1884), 13 Q. B. D. 505; 53 L. J. M. C. 161.

(*n*) Fairtlough *v.* Whitmore (1895), 64 L. J. Ch. 386; 72 L. T. 354.

(*o*) Reg. *v.* Davies, [1897] 2 Q. B. 199; 66 L. J. Q. B. 513.

(*p*) 55 Vict. c. 4.

continued existence of the premises, and as they had been burnt down without the fault of either party, both parties were excused.

Why did he promise absolutely?

"*You shouldn't promise what you can't perform*," is a remonstrance as just as it is familiar. A man is not obliged to enter into an absolute contract. He may provide for as many contingencies as he pleases; and if he chooses to promise *absolutely* when it is in his power to promise *conditionally*, he has only himself to blame if the consequences are unpleasant. If, for instance, the charterer of a ship agrees to put a cargo on board at a particular port, he contracts absolutely, and does not protect himself against the chance of a

Frost or infectious disease.

frost (*q*), or the prevalence of an infectious disease (*r*), or a strike taking place (*s*), preventing or delaying the fulfilment of his undertaking. So, a tenant is not discharged from his covenant to pay

Paradine *v.* Jane.

rent, or to repair, by the premises being accidentally destroyed, or even by his being kept out of possession by the King's enemies (*t*).

Life becoming uninsurable.

In August, 1873, on the occasion of his marriage, a gentleman contracted with trustees to insure his life on or before July 2nd, 1875. Before that date arrived, however, his life became uninsurable, and he died without having performed his contract. It was held that the breaking down of his health, being what all of us are liable to, was no excuse, and that the trustees were entitled to rank as creditors (*u*).

But sometimes the contract is physically impossible at the time of its making, *and both the parties know it*. Such a contract is void. There is *no intention* to perform it on the one side, *no expectation*

(*q*) Kearon *v.* Pearson (1861), 31 L. J. Ex. 1; 7 H. & N. 386; and see Kay *v.* Field (1882), 47 L. T. 423; Porteus *v.* Watney (1878), 3 Q. B. D. 534; 47 L. J. Q. B. 643; Appleby *v.* Myers (1867), L. R. 2 C. P. 651; 36 L. J. C. P. 331; Howell *v.* Coupland (1876), 1 Q. B. D. 258; 46 L. J. Q. B. 147.

(*r*) Barker *v.* Hodgson (1814), 3 M. & S. 267; 15 R. R. 485. See also Jones *v.* St. John's College (1870), L. R. 6 Q. B. 115; 40 L. J. Q. B. 80; Dodd *v.* Churton, [1897] 1 Q. B. 562; 66 L. J. Q. B. 477; Thorn *v.* London (1876), 1 App. Cas. 120; 45 L. J. Ex. 487; and Pandorf *v.* Hamilton (1886), 17 Q. B. D. 674; 55 L. J. Q. B. 546.

(*s*) Budgett *v.* Binnington, [1891] 1 Q. B. 35; 60 L. J. Q. B. 1; but see Hick *v.* Raymond, [1893] A. C. 22; 62 L. J. Q. B. 98; affirming the decision of the Court of Appeal, sub nom. Hick *v.* Rodocanachi, [1891] 2 Q. B. 626; 61 L. J. Q. B. 42; Castlegate Steamship Co. *v.* Dempsey, [1892] 1 Q. B. 854; 61 L. J. Q. B. 620.

(*t*) Paradine *v.* Jane (1646), Aleyn, 26; and see Manchester Bonded Warehouse Co. *v.* Carr (1880), 5 C. P. D. 507; 49 L. J. Q. B. 809; and Marshall *v.* Schofield (1882), 47 L. T. 406.

(*u*) Arthur *v.* Wynne (1880), 14 Ch. D. 603; 49 L. J. Ch. 603; and see Gibbons *v.* Chambers (1885), 1 C. & E. 577.

that it will be performed on the other. An undertaking to jump over the moon, or to run from the Temple to Scarborough and back in five minutes, would probably be held void for impossibility. If, however, the thing contracted for, however unlikely that any one should accomplish it, is just conceivably possible, the contract may be good; *e.g.*, if a man agrees to make a flying machine that will get across the Atlantic in two hours (*x*). Jumping over the moon.

A man, moreover, may warrant the acts of third persons, or even a natural event possible in itself. Thus, it has been said that *a covenant that it shall rain to-morrow* might be good (*y*).

Sometimes the contract is impossible at the time of its making, but the parties do not know it. For example, there may be bargaining going on about a cargo supposed to be on the voyage, but which, as it happens, has been already sold by reason of sea damage. Such a contract is void, being subject to the implied condition that the cargo, as such, is still in existence (*z*). So, the sale of a life annuity is impliedly conditional on the annuitant being alive at the time of the sale (*a*). Ignorance of what has happened.

When the fulfilment of a contract for *personal services* is prevented by the *act of God*, the promisor is excused, unless it clearly appears from the terms of the contract that he was to be liable whatever happened (*b*). A lecturer, for instance, who did not attend as expected, would have a sufficient legal excuse in a sudden illness. So of an author who had agreed to write a book. But he ought to give the earliest notice that is reasonably practicable. In such a case as this, the privilege of rescinding the contract is not merely that of the invalided performer, but also that of the party engaging him, who may decline to have a man who is too ill to do his work properly (*c*). So, too, if a master dies during the service, the servant has no remedy against his executors (*d*). Too ill to come.

(*x*) Clifford *v.* Watts (1870), L. R. 5 C. P. 577; 40 L. J. C. P. 36.

(*y*) Per Maule, J., in Canham *v.* Barry (1855), 15 C. B. 597; 24 L. J. C. P. 100.

(*z*) Couturier *v.* Hastie (1850), 5 H. L. C. 673; 22 L. J. Ex. 97.

(*a*) Strickland *v.* Turner (1852), 7 Ex. 208; 22 L. J. Ex. 115; and see sect. 6 of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), which provides that "where there is a contract for the sale of *specific goods*, and the goods without the knowledge of the seller have perished at the time when the contract is made, the contract is void."

(*b*) Boast *v.* Firth (1868), L. R. 4 C. P. 1; 38 L. J. C. P. 1; and Robinson *v.* Davison (1871), L. R. 6 Ex. 269; 40 L. J. Ex. 172.

(*c*) Poussard *v.* Spiers (1876), 1 Q. B. D. 410; 45 L. J. Q. B. 621.

(*d*) Farrow *v.* Wilson (1869), L. R. 4 C. P. 744; 38 L. J. C. P. 326. But as to a servant's rights on the voluntary dissolution of a partnership firm, with whom he was engaged for a term not then concluded, see Brace *v.* Calder, [1895] 2 Q. B. 253; 64 L. J. Q. B. 582; and see, further, *post*, p. 411, sub tit. "Wrongful Dismissal."

Station not wanted.

The intervention of an Act of Parliament will also excuse the performance of a promise, because parties must be considered as contracting with reference to the existing state of the law, and *lex non cogit ad impossibilia*. In the leading case on this point a lessor had covenanted that no buildings should be erected in a paddock fronting the demised premises, somewhere in Camberwell, and then a railway company, under its compulsory powers, erected a station there (*e*).

Appleby *v.* Myers.

As already stated, Taylor *v.* Caldwell was decided on the ground that when the performance depends on the continued existence of the thing, a condition is implied that the impossibility arising from its accidental destruction shall excuse performance. In Appleby *v.* Myers (1867), the plaintiff had agreed with the defendant to put up some machinery on his premises to be paid for when finished. In the course of the work, premises, machinery, and everything were destroyed by fire. It was held that both parties were excused from further performance, and that no liability accrued on either side (*f*).

Howell *v.* Coupland.

In Howell *v.* Coupland (1876) a farmer had agreed to sell to a potato merchant 200 tons of potatoes grown on a particular piece of land belonging to the former. Before the time for performance arrived, the farmer's potatoes were attacked by the potato blight, and he was only able to deliver about 80 tons. It was held that an action to recover damages for the non-delivery of the residue could not be maintained (*g*). And now it is expressly provided by sect. 7 of the Sale of Goods Act, 1893 (*h*), that "where there is an agreement to sell *specific goods*, and subsequently the goods, without any fault on the part of the seller or buyer, perish *before the risk passes* to the buyer, the agreement is thereby avoided" (*i*). This section was discussed by the Court of Appeal in the recent case of Nickoll *v.* Ashton (*k*), when the principle of Taylor *v.* Caldwell was applied.

Turner *v.* Goldsmith.

On the other hand, in the case of Turner *v.* Goldsmith (*l*), an action for damages was held to be maintainable against a shirt

(*e*) Baily *v.* De Crespigny (1869), L. R. 4 Q. B. 180; 38 L. J. Q. B. 98; and see Brewster *v.* Kitchin (1678), 1 Salk. 198; and Mayor of Berwick *v.* Oswald (1853), 1 E. & B. 295; 22 L. J. Q. B. 129.

(*f*) L. R. 2 C. P. 651; 36 L. J. C. P. 331. See Forman *v.* The Liddesdale, [1900] A. C. 190; 69 L. J. P. C. 44.

(*g*) 1 Q. B. D. 258; 46 L. J. Q. B. 147.

(*h*) 56 & 57 Vict. c. 71.

(*i*) As to *when* the risk passes, see *post*, pp. 326 *et seq.*

(*k*) [1901] 2 K. B. 126; 70 L. J. K. B. 600.

(*l*) [1891] 1 Q. B. 544; 60 L. J. Q. B. 247. This case was recently distinguished in Turner *v.* Sawdon, [1901] 2 K. B. 653; 70 L. J. K. B. 897. And see Northey *v.* Trevillion (1902), 7 Com. Cas. 201; and Ogden's, Limited *v.* Nelson, [1903] 2 K. B. 287; 72 L. J. K. B. 767.

manufacturer who had agreed to employ the plaintiff as agent and traveller for five years. After about two years the defendant's manufactory was burnt down, and he did not resume business, and had thenceforth ceased to employ the plaintiff. This case should be distinguished from Rhodes *v.* Forwood (*m*).

The case of Hamlyn *v.* Wood (*n*) may be referred to here, though the question determined was as to the circumstances under which the Court will imply a term which is not expressed in a written contract. A., who carried on business as a brewer, entered into an agreement in writing, by which he agreed to sell to B., and B. agreed to buy, all the grains made by A., at the average of the rates charged each year by certain specified firms, from 1885 until 1895. In 1890 A. sold his business, and in consequence ceased to supply grains to B. It was held that a term could not be implied in the contract to the effect that A. would not by any voluntary act of his own prevent himself from continuing the sale of grains to B. for the period mentioned. "It would have been a different thing," said Kay, L. J., "if the contract had been to pay so much down for a supply of grains for ten years." Hamlyn *v.* Wood.

(*m*) (1876), 1 App. Cas. 256; 47 L. J. Ex. 396.

(*n*) [1891] 2 Q. B. 488; 60 L. J. Q. B. 734.

INTERPRETATION AND OPERATION.

Written Contracts and Oral Evidence.

[53] **GOSS *v.* NUGENT.** (1833)

[5 B. & Ad. 58; 2 N. & M. 28.]

Lord Nugent entered into a written agreement with Mr. Goss to buy from him several lots of land for £450, the vendor undertaking to make a good title to all the lots. Soon afterwards Goss found that as to one of the lots he could not make a good title; and of course Lord Nugent would then have been perfectly justified in retiring from the transaction. Instead of doing so, he *agreed orally to waive the necessity of a good title being made as to that lot.* Afterwards, however, his lordship seems to have altered his opinion as to the desirability of becoming the owner of the land, and he declined to pay the purchase-money, relying on the objection to the title. In answer to that, Goss wished to prove that after Lord Nugent knew about the defect of the title he agreed to waive it. This, however, was not allowed, for the rule is that *a written contract within the Statute of Frauds cannot be varied by oral evidence of what passed between the parties subsequently to the making of it.*

The rule that a written contract cannot be varied by parol is subject to one or two exceptions.

When agreement need not have been in writing.

Supposing the contract to be one which, though it *is* in writing, *need not have been*, it may be varied by parol evidence of what took place between the parties *after* the date of the agreement. Thus, if the original agreement between Goss and Nugent had not been required by the Statute of Frauds to be in writing, Nugent's consent to take one lot, though the title was bad, might have been proved (*a*).

To show condition.

And, notwithstanding the general rule that parol evidence of what took place between the parties *previously to* or *contemporaneously with* the written agreement is inadmissible, such evidence may nevertheless be given to show that the execution of the written agreement was conditional on some event happening; in fact, that a document purporting to be a final and absolute contract purports to be what it is not. Thus, in Pym *v.* Campbell(*b*), the parties had entered into a written agreement for the sale of an interest in a patent, and *at the same time had verbally agreed that the sale should not take place unless* an engineer named Abernethie approved of the invention. Abernethie did not approve, and the question was whether the condition could be proved. It was held that it could, on the ground that the object of the evidence offered was, not to vary a written agreement, but to show that there was *not an agreement at all*. Similar evidence was also admitted in a case where two farmers had agreed in writing that one of them should transfer his farm to the other, and had at the same time verbally agreed that the transfer should be conditional on the landlord's consent(*c*).

Pym *v.* Campbell.

Consignment note.

To take yet another illustration of constant occurrence, a cattle-dealer, a few years ago, wanted to send some cattle from Guildford to the Islington market. They told him at Guildford Station that the beasts would be duly forwarded to King's Cross; but they induced him to sign a consignment note by which the cattle were directed to be taken to the Nine Elms Station, which, of course, was not so far as the cattle-dealer expected them to go. At this intermediate station they remained, and suffered injury from not being fed or looked after properly. The company's view was that the consignment note was conclusive evidence of the terms of the contract, and therefore that they had never undertaken to carry beyond the Nine Elms Station. But for the cattle-dealer it was successfully contended *that the consignment note did not constitute a*

(*a*) See also Eden *v.* Blake (1845), 13 M. & W. 614; 14 L. J. Ex. 194; Noble *v.* Ward (1867), L. R. 2 Ex. 135; 36 L. J. Ex. 91; Mercantile Bank of Sydney *v.* Taylor, [1893] A. C. 317; 57 J. P. 741.

(*b*) (1856), 6 E. & B. 370; 25 L. J. Q. B. 277; followed in the recent case of Pattle *v.* Hornibrook, [1897] 1 Ch. 25; 66 L. J. Ch. 144.

(*c*) Wallis *v.* Littel (1861), 11 C. B. N. S. 369; 31 L. J. C. P. 100.

complete contract, and that parol evidence could be given of the conversation that had taken place between the plaintiff and the company's servants before the consignment note was signed (*d*).

Evans *v.* Roe.

On the other hand, when a writing appears to be a complete contract, oral evidence to vary it is inadmissible. In Evans *v.* Roe (*e*), for instance, a memorandum in writing by which the plaintiff agreed to become foreman of the defendant's works was construed to show a weekly hiring, and it was held that evidence of a conversation, at the time of signing the contract, tending to show that a yearly hiring was intended, could not be given. So, too, in the recent case of New London Credit Syndicate *v.* Neale (*f*), it was held that evidence of a contemporaneous oral agreement to renew a bill of exchange was inadmissible in an action upon the bill, on the ground that its effect would be to contradict the terms of the written instrument.

There are other cases, however, in which parol evidence may be given, notwithstanding that there is a written contract.

Separate oral agreement.

"The existence of any separate oral agreement as to any matter on which a document is silent, and which is not inconsistent with its terms, if from the circumstances of the case the Court infers that the parties did not intend the document to be a complete and final statement of the whole of the transaction between them" (*g*), may be proved, *e.g.*, on the execution of a lease, an oral promise by the lessor to keep down the game (*h*). In the recent case of De Lassalle *v.* Guildford (*i*), upon the execution of a lease of a dwelling-house, the landlord verbally warranted that the drains were in good condition. The lease contained covenants by the lessee to do the inside, and by the lessor to do the outside repairs, but was silent as to the then condition of the drains. Under these circumstances, the Court of Appeal held that the parol warranty was collateral to the lease and admissible in evidence, and that the tenant was entitled to maintain an action for the breach of it.

Limit of principle.

And it should be observed that the principle that parol evidence

(*d*) Malpas *v.* L. & S. W. Ry. Co. (1866), L. R. 1 C. P. 336; 35 L. J. C. P. 166.

(*e*) (1872), L. R. 7 C. P. 138; 26 L. T. 70; and see Cato *v.* Thompson (1886), 9 Q. B. D. 616; 47 L. T. 491.

(*f*) [1898] 2 Q. B. 487; 67 L. J. Q. B. 825; following Young *v.* Austen (1869), L. R. 4 C. P. 553; 38 L. J. C. P. 233; and see Abrey *v.* Crux (1870), L. R. 5 C. P. 37; 39 L. J. C. P. 9.

(*g*) Steph. Dig. Ev. p. 96 (5th ed.); Williams *v.* Jones (1888), 36 W. R. 573.

(*h*) Morgan *v.* Griffith (1871), L. R. 6 Ex. 70; 40 L. J. Ex. 46; Marzetti *v.* Smith (1882), 49 L. T. 580; 1 C. & E. 6; Aste *v.* Stumore (1884), 1 C. & E. 319.

(*i*) [1901] 2 K. B. 215; 70 L. J. K. B. 533.

cannot be received to contradict or modify the terms of a written contract, does not apply to a document which forms no part of the contract, and cannot be used to exclude parol evidence of the circumstances attending the signature of one of the parties to such document (*k*).

To show fraud, illegality, &c.

Moreover, oral evidence may be given to prove fraud or illegality, to show the situation of the parties (*l*), to ascertain the meaning of illegible or unintelligible characters, to explain technical or provincial expressions, to bring in usage of trade, to identify the subject-matter, to introduce a principal not named in the contract (*m*), and for a variety of similar purposes.

"But evidence may not be given to show that common words, the meaning of which is plain, and which do not appear from the context to have been used in a peculiar sense, were, in fact, so used" (*n*).

Latent and patent ambiguities.

An important distinction as to when oral evidence can be given to affect a written instrument, and when it cannot, is between a *latent* and a *patent* ambiguity. A *latent* ambiguity is not apparent on the face of the instrument. The document seems to the stranger reading it to be plain and simple enough; but, really, there are two states of fact equally answering to the instrument. To correct such an ambiguity, and show what was intended, parol evidence is admissible. Thus, where a devise was to Stokeham Huthwaite *second* son of John Huthwaite, whereas really Stokeham Huthwaite was the *third* son, evidence of the surrounding circumstances was admitted to show whether the testator had made a mistake in the name or in the description (*o*). And in a recent case (*p*) where under a written contract a person was to be allowed a commission on "the estimate of £35,000," and a further commission if "the total cost of the works" was reduced below £30,000; extrinsic evidence was held admissible to show that the estimate referred to was for the execution of the work exclusively of the cost of the land purchased, and the amount of commission. But parol evidence cannot be given to correct a *patent* ambiguity. Thus, in a case where a bill of exchange had been drawn for "Two hundred pounds," but the figures at the top were "£245" and the stamp

(*k*) Bank of Australasia *v.* Palmer, [1897] A. C. 540; 66 L. J. P. C. 105.

(*l*) Newell *v.* Radford (1867). L. R. 3 C. P. 52; 37 L. J. C. P. 1.

(*m*) Trueman *v.* Loder (1840), 11 A. & E. 589; 3 P. & D. 567.

(*n*) Steph. Dig. Ev. 99; and see Blackett *v.* Roy. Exch. Ass. Co. (1832), 2 C. & J. 244; 2 Tyr. 266.

(*o*) Doe *d.* Le Chevalier *v.* Huthwaite (1820), 3 B. & Ald. 632; 8 Taunt. 306.

(*p*) Bank of New Zealand *v.* Simpson, [1900] A. C. 182; 69 L. J. P. C. 22.

corresponded to the higher amount, evidence was not admitted to show that £245 was really the sum intended (*q*). In the well-known case of Doe *v.* Needs (*r*), a man had devised one house to George Gord, the son of George Gord, a second to George Gord, the son of John Gord, and a third to "*George, the son of Gord.*" Evidence was admitted to show that the testator really meant George, the son of *George* Gord. To the reception of such evidence it was objected that the ambiguity was *patent*. But it was answered that it could only appear ambiguous by showing *aliunde* the non-existence of a George, the son of Gord, different from the other two Georges; and that the mention of another George in the same will had no other effect than extrinsic proof of the same fact would have had.

Doe *v.* Needs.

Though parol evidence may rarely be given to *vary* a written contract, it may generally be given to *rescind* it altogether; and the better opinion is that this is so even where the contract is one of those which are required by statute to be in writing (*s*). But a contract in writing good under the Statute of Frauds is not rescinded by a subsequent invalid oral contract intended to be substituted for the former one (*t*).

Oral evidence to rescind.

A deed cannot be varied or discharged except by another deed (*u*). But, in an action to recover unliquidated damages for breach of a contract under seal, accord and satisfaction *after breach* is a good plea.

Written Contracts and Evidence of Usage.

[54] **WIGGLESWORTH** *v.* **DALLISON.** (1779)

[1 Doug. 200.]

By lease dated March 2nd, 1753, Dallison let Wigglesworth have a field in Lincolnshire for 21 years. In the last year of his tenancy, though he knew that he had to

(*q*) Sanderson *v.* Piper (1839), 5 Bing. N. C. 425; 7 Scott, 408.
(*r*) (1836), 2 M. & W. 129; 6 L. J. (N. S.) Ex. 59.
(*s*) Goman *v.* Salisbury (1684), 1 Vern. 240.
(*t*) Noble *v.* Ward (1867), L. R. 2 Ex. 135; 36 L. J. Ex. 91; Moore *v.* Campbell (1854), 10 Ex. 323; 23 L. J. Ex. 310.
(*u*) West *v.* Blakeway (1841), 2 M. & G. 729; 3 Scott, N. R. 199.

give up the land almost immediately, the farmer sowed his field with corn. In doing what might seem a rash and improvident act, Wigglesworth was relying on a certain local custom, which entitled an out-going tenant of lands to his way-going crop, that is, to the corn left standing and growing at the expiration of the lease. Dallison's answer to this claim was that, if any such custom existed at all, it had no application to the present case, where the terms between landlord and tenant had been carefully drawn up in a lease by deed, and no mention made therein of any custom. The Court, however, decided in favour of the custom, Lord Mansfield remarking that while it was just and reasonable and for the benefit of agriculture, it *did not alter or contradict* the agreement in the lease, but only superadded a right.

Custom cannot vary written contract.

Parol evidence of the custom of a particular place or trade cannot be given to *vary* a written contract. If the terms of the contract are perfectly clear and exhaustive (and whether they are so is *for the Court*, and not for the jury to decide) (*x*) the maxim, *expressum facit cessare tacitum*, has application. In one case (*y*), it appeared that by the custom of the country, the out-going tenant was entitled to an allowance for foliage from the incoming tenant. This, therefore, if the lease had been silent on the subject, would have had to be paid. But the lease was *not* silent. It particularly specified the payments which were to be made by the incoming to the out-going tenant, *and amongst them it did not mention any payment in respect of foliage*. It was held, therefore, that the terms of the lease were perfectly clear, and excluded the custom. "Where there is a written agreement between the parties," said Bayley, J., "it is naturally to be expected that it will contain all the terms of their bargain; but if it is entirely silent as to the terms of quitting, it may let in the custom of the country as to that particular. If, however, it specifies any of those terms, we must then go by the lease alone. The custom of the country applies to those cases only where the specific terms are unknown; and it is founded on this principle, that justice requires that a party should quit upon the same terms as he entered."

(*x*) Bowes *v.* Shand (1877), 2 App. Cas. 455; 46 L. J. Q. B. 561.

(*y*) Webb *v.* Plummer (1818), 2 B. & Ald. 746; 21 R. R. 479.

Maxim.

The maxim is, *In contractis tacite insunt quæ sunt moris et consuetudinis.*

So, too, in mercantile contracts. If you insure a ship and cargo for a voyage, and the terms of the policy are that "the insurance on the ship shall continue till she is moored 24 hours, *and on the goods till safely landed*," and your ship reaches the haven, and has been moored the 24 hours, and then afterwards, and *before being landed*, the goods are lost, the insurance people will not be allowed to cheat you by showing a custom that the risk *on the goods as well as on the ship* expires in 24 hours; why, you expressly stipulated that ship and cargo should stand on different footings; and are entitled to the benefit of your foresight, all the customs in the universe notwithstanding (*z*). Similarly, when a man in the pig trade sold what he warranted to be "prime singed bacon," but which proved to be neither palatable or fragrant, he was not permitted to turn round and produce a convenient custom in his trade to the effect that "prime singed bacon" is prime singed bacon none the less because it happens to be very much tainted (*a*). So, in Hayton *v.* Irwin (*b*), where by the terms of a charter-party a ship was to deliver at Hamburg, "or so near thereto as she could safely get," it was held that a defence alleging that by the custom of the port of Hamburg the charterer was not bound to take delivery elsewhere than at Hamburg, was bad, inasmuch as it sought to set up a custom inconsistent with the written contract.

Our "prime singed bacon."

But may explain or add terms.

But though a written contract cannot be *varied* by evidence of the custom of a particular trade or place, it may be *explained* thereby, and it may have *incidents annexed*.

(1.) It may be *explained*. Evidence has been admitted to show that the Gulf of Finland, though not geographically so, was always considered by merchants as part of the Baltic (*c*); that "good barley" and "fine barley" were different things (*d*); that 1,000 rabbits meant 1,200 (*e*); and that, when a young lady was engaged as an actress for "three years," the three years meant *only the theatrical seasons* of those years (*f*).

Custom to take holidays.

(2.) *Incidents* may be *annexed*. The leading case is an excellent

(*z*) Parkinson *v.* Collier (1797), Park Ins. p. 653 (8th ed.).

(*a*) Yates *v.* Pym (1816), 6 Taunt. 446; 1 Holt, N. P. 95.

(*b*) (1879), 5 C. P. D. 130; 41 L. T. 666. See also Barrow *v.* Dyster (1884), 13 Q. B. D. 635; 51 L. T. 573; Pike *v.* Ongley (1887), 18 Q. B. D. 708; 56 L. J. Q. B. 373; The Nifa, [1892] P. 411; 62 L. J. P. 12.

(*c*) Uhde *v.* Walters (1811), 3 Camp. 16; 13 R. R. 737.

(*d*) Hutchison *v.* Bowker (1839), 5 M. & W. 535; 52 R. R. 821.

(*e*) Smith *v.* Wilson (1832), 3 B. & Ad. 728; 1 L. J. K. B. 194.

(*f*) Grant *v.* Maddox (1846), 15 M. & W. 737; 16 L. J. Ex. 227.

illustration here. So is Reg. *v.* Stoke-upon-Trent (*g*), where it was held that where some workmen by written contract engaged themselves "to lose no time on our own account, to do our work well, and behave ourselves in every respect as good servants," evidence might nevertheless be given of a custom in the particular trade for the workmen to have certain holidays in the year, and the Sundays to themselves. The principle on which incidents are allowed to be annexed to written contracts is that "the parties *did not mean to express in writing the whole of the contract* by which they intended to be bound, but to contract with reference to certain known usages" (*h*).

Domestic service.

A custom that either master or servant may determine domestic service at the end of the first month by notice given at or before the expiration of the first fortnight, is not in itself unreasonable; but inasmuch as such a custom has not yet been so fully established that judicial notice can be taken of it, it must be proved in each case as a question of fact (*i*).

Stock Exchange usages.

Except when the mode of dealing is that of a particular house, such as Lloyd's (in which case he must be proved to have been acquainted with it) (*k*), a man is bound by the usages of the place or trade with which his contract has to do, and his ignorance of those usages is immaterial. A man, for instance, who employs a broker to do business on a Stock Exchange is bound by the usages of such Stock Exchange in the absence of any evidence to the contrary (*l*).

But a custom of trade in order to be valid must, as a rule, be known in business generally and not merely to persons dealing in a particular market; for instance, a custom of trade by which goods are left in the possession of persons to whom they do not belong, so as to exclude the doctrine of "reputed ownership" under the bankruptcy laws (*m*).

Requisites of custom.

To make a particular custom good, it must be *immemorial* (*n*),

(*g*) (1843), 5 Q. B. 303; 12 L. J. Q. B. 41.

(*h*) Per Parke, B., in Hutton *v.* Warren (1836), 1 M. & W. 475; 5 L. J. Ex. 234.

(*i*) Moult *v.* Halliday, [1898] 1 Q. B. 125; 67 L. J. Q. B. 451. As to the notice to which domestic servants are entitled, see *post*, p. 414.

(*k*) Gabay *v.* Lloyd (1825), 3 B. & C. 793; 5 D. & R. 641.

(*l*) See Sutton *v.* Tatham (1839), 10 Ad. & E. 27; 8 L. J. Q. B. 210; Bayliffe *v.* Butterworth (1847), 1 Ex. 425; 17 L. J. Ex. 78; Neilson *v.* James (1882), 9 Q. B. D. 546; 51 L. J. Q. B. 369; Seymour *v.* Bridge (1885), 14 Q. B. D. 460; 54 L. J. Q. B. 347; Loring *v.* Davis (1886), 32 Ch. D. 625; 55 L. J. Ch. 725; Davis *v.* Howard (1890), 24 Q. B. D. 691; 59 L. J. Q. B. 133; Smith *v.* Reynolds (1892), 66 L. T. 808; and Forget *v.* Baxter, [1900] A. C. 467; 69 L. J. P. C. 101.

(*m*) *In re* Goetz, Jones & Co., [1898] 1 Q. B. 787; 67 L. J. Q. B. 577.

(*n*) But the Courts will sometimes

continued, peaceable, reasonable, certain, compulsory, and not inconsistent. Reasonableness is a question of law for the Court. In Hall *v.* Nottingham (*o*), it was held that a custom for the inhabitants of a parish to enter on a person's field in the parish, put up a maypole, dance, play at kiss-in-the-ring, and otherwise enjoy themselves, at any time in the year, in defiance of the proprietor, was good. But in the previous case of Sowerby *v.* Coleman (*p*), it had been held that a custom for inhabitants of a parish to train and exercise horses at all seasonable times of the year in a place *beyond the limits of the parish* was bad. So, too, a custom for the inhabitants of *several* adjoining or contiguous parishes to exercise the right of recreation over land situate in *one* of such parishes is bad (*q*). And in another case (*r*), it was held that a custom that an out-going tenant should look not to the landlord, but to the incoming tenant, for payment for seeds, tillages, &c., could not be supported, for it was "unreasonable, uncertain, and prejudicial to the interests both of landlords and tenants." In Tucker *v.* Linger (*s*), it was held that a custom, universal in the chalk districts, for the tenant of a farm to sell the flint stones turned up in ploughing, was reasonable, and could be proved, notwithstanding an agreement reserving to the landlord "all mines, minerals, quarries of stone, sand, brick-earth, and gravel." "It is good for the land," said Jessel, M. R., "that the flints should be removed, and it appears to me not unreasonable that the tenant, who has to remove them as injurious to the land, should sell them for his own benefit. I think the Court should not interfere with a custom of the country except upon very strong grounds." A custom that a parson as owner of the great tithes shall provide and keep a bull and boar for the common use of the kine and sows of the parishioners is good (*t*).

Dancing in somebody else's field.

Exercising horses.

Selling flint stones turned up in ploughing.

presume the legal origin of customs, although the evidence begins well within modern times. See L. & N. W. Ry. Co. *v.* Fobbing Levels Commissioners (1897), 66 L. J. Q. B. 127; 75 L. T. 629; and Att.-Gen. *v.* Wright, [1897] 2 Q. B. 318; 66 L. J. Q. B. 834.

(*o*) (1875), 1 Ex. Div. 1; 45 L. J. Ex. 50.

(*p*) (1867), L. R. 2 Ex. 96; 36 L. J. Ex. 57.

(*q*) Edwards *v.* Jenkins, [1896] 1 Ch. 308; 65 L. J. Ch. 222.

(*r*) Bradburn *v.* Foley (1878), 3 C. P. D. 129; 47 L. J. Q. B. 331.

(*s*) (1882), 21 Ch. D. 18; 51 L. J. Ch. 713; and see Goodman *v.* Saltash (1882), 7 App. Cas. 633; 52 L. J. Q. B. 193.

(*t*) Per Kekewich, J., in Lanchbury *v.* Bode, [1898] 2 Ch. 120; 67 L. J. Ch. 196. This custom is alluded to by Shakespeare in Henry IV., Part II., Act ii., Scene 2; and also in the last chapter of Sterne's "Tristram Shandy."

Construction of Contracts.

ROE *v.* TRANMARR. (1758) [55]

[WILLES, 632.]

A deed bade fair to become void altogether as purporting to grant a freehold *in futuro*—a thing which the common law will not allow (*u*). It was saved, however, from this untimely fate by the merciful construction that, though void as a release, it might yet avail as a covenant to stand seised, the Court citing the maxim, *benigne faciendæ sunt interpretationes chartarum, ut res magis valeat quam pereat.*

Intention of contracting parties.

In construing a written contract (which construction is *for the Court*), the *intention* of the contracting parties must be looked to, *the sense in which the promisor believed that the promisee accepted the promise* being the principal test. But, on the other hand, it is of no consequence what the intention of the contracting parties was if their written agreement, though totally inconsistent with such intention, is precise and clear.

The chief rules of construction are the following:—

(1.) The construction must be *reasonable*.

Construction must be reasonable.

One surgeon sold his business to another and covenanted not to practise within a certain distance. On the reasonable construction of this covenant, it was held not to have been broken by the retired surgeon's acting in an emergency, so long as he was not trying to get his practice back (*x*). So, in a charter-party, "the words '*as near thereto as she can safely get*' must receive a reasonable and not a literal application" (*y*). So, too, where a young man living with his father in Lambeth was at the same time apprenticed to some mechanical engineers in the same district, a notice to remove to Derby was held unreasonable (*z*).

(*u*) See Savill *v.* Bethell, [1902] 2 Ch. 523; 71 L. J. Ch. 652.

(*x*) Rawlinson *v.* Clarke (1845), 14 M. & W. 187; 14 L. J. Ex. 364.

(*y*) Per Lush, J., in Capper *v.* Wallace (1880), 5 Q. B. D. 163; 49 L. J. Q. B. 350.

(*z*) Eaton *v.* Western (1882), 9 Q. B. D. 636; 52 L. J. Q. B. 41.

Liberal.

(2.) The construction must be *liberal*.

For example, the masculine will generally include both genders.

Favourable.

(3.) The construction must be *favourable*.

If it is possible to put two constructions on an agreement—one which would make it illegal and void, and the other which would not, the latter view must be taken. See the leading case. See also the Bills of Exchange Act, 1882, s. 26 (2).

Ordinary sense of words.

(4.) Words must be construed in their *ordinary sense*.

An annuity was to become void if a woman, separated from her husband, "associated" with a particular person. It was held that to receive the man's visits whenever he chose to call was "associating" with him, and that, in fact, all intercourse, however innocent, was prohibited(*a*). In the case of M'Cowan *v.* Baine(*b*), the law was stated by Lord Watson to be that "contracts ought to be construed according to the primary and natural meaning of the language in which the contracting parties have chosen to express the terms of their mutual agreement. But there are exceptions to the rule. One of these is to be found in the case where the context affords an interpretation different from the ordinary meaning of the words; and another in the case where their conventional meaning is not the same with their legal sense. In the latter case, the meaning to be attributed to the words of the contract must depend upon the consideration whether, in making it, the parties had or had not the law in their contemplation."

Usage, however, may give words a *technical meaning*.

Context.

(5.) The *whole context* must be considered.

One part of the document may throw important light on another; *ex antecedentibus et consequentibus fit optima interpretatio*. The luminous judgment of Lord Chelmsford, L. C., in Monypenny *v.* Monypenny (*c*), and the case of Piggott *v.* Stratton (*d*), may be referred to in illustration of this rule.

Contra proferentem.

(6.) The words of a contract must be construed most *strongly against the grantor* (*e*).

(*a*) Dormer *v.* Knight (1809), 1 Taunt. 417; and see Barton *v.* Fitzgerald (1812), 15 East, 530; 13 R. R. 519; Biddlecombe *v.* Bond (1835), 4 Ad. & E. 332; 5 N. & M. 621.

(*b*) [1891] A. C. 401; 65 L. T. 502.

(*c*) (1860), 9 H. L. C. 114; 31 L. J. Ch. 269.

(*d*) (1859), 29 L. J. Ch. 9: 1 De G. F. & J. 33.

(*e*) In Taylor *v.* Corporation of St. Helen's (1877), 6 Ch. D. 264; 46 L. J. Ch. 857; Sir George Jessel, M. R., doubted whether this rule had any force. It has, however, since been recognized and acted upon by the Courts. See *ex. gr.*, per Brett, M. R., in Burton *v.* English (1883), 12 Q. B. D. 218; 53 L. J. Q. B. 133; and per Lord Macnaghten in Gluckstein *v.* Barnes, [1900] A. C. 250; 69 L. J. Ch. 385.

Verba chartarum fortius accipiuntur contra proferentem; the law shrewdly suspecting that every man will take care to guard his own interests.

This rule, however, is applicable only as a *last resource*, and in the case of a grant from the Crown is reversed altogether (*f*). Moreover, it would appear that the rule is not to be applied when it would work a wrong to a third person; *constructio legis non facit injuriam* (*g*). See also Stewart *v.* Merchants' Marine Insurance Co. (1886), 16 Q. B. D. 619; 55 L. J. Q. B. 81.

Time. Unless a different intention appears from the terms of the contract, stipulations as to time of payment are not deemed to be of the essence of a contract of sale.

"Month." In a contract of sale, "month" means *primâ facie* calendar month (*h*).

Warranties, &c.

LOPUS *v.* CHANDELOR. (1603) [56]

[2 CROKE, 2.]

A jeweller sold a man a stone saying it was a bezoar, when it was not. It was held, however, that he was not liable *in contract* because his assertion did not amount to a warranty; nor *in tort* because he might have believed what he said.

Mere affirmation may be warranty. The probabilities are that if Lopus had been a litigant of to-day he would have succeeded on both points:—in *contract*, because "every *affirmation* at the time of the sale of a personal chattel is a *warranty* if it appear to have been intended as such," and Chandelor's assertion that the stone was a bezoar would no doubt be considered sufficient; and in *tort*, because the fact that the defendant was a jeweller would be damning evidence that he knew one stone from another.

(*f*) Eastern Archipelago Co. *v.* Reg. (1853), 2 E. & B. 856; 23 L. J. Q. B. 82.

(*g*) Per Sir Joseph Napier, Rodger *v.* Comptoir d'Escompte de Paris (1869), L. R. 2 P. C. 406; 38 L. J. P. C. 30.

(*h*) See 56 & 57 Vict. c. 71, s. 10.

Definition.

"Warranty" is defined by sect. 62 of the Sale of Goods Act, 1893 (*i*), as "an agreement with reference to goods which are the subject of a contract of sale, but collateral to the main purpose of such contract, the breach of which gives rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated."

Test to be applied to affirmation.

It is often a difficult matter to decide whether the seller intended his representation to be a warranty or not. The test to determine his intention is, *did he assume to assert a fact of which the buyer was ignorant?* If he did, he warranted. Two well-known picture-dealing cases illustrate this distinction. In one of them the seller, at the time of sale, gave the following bill of parcels:—

Power *v.* Barham, and Jendwine *v.* Slade.

"*Four pictures, Views in Venice, Canaletto*, £160."

It was held that the jury might very well find that the words imported *a warranty that Canaletto had painted the pictures* (*k*). In the other case, a sea-piece and a fair had been sold, the former being catalogued as by Claude Lorraine, and the latter by Teniers. It was held that, as those artists had lived so long ago, it was impossible for anyone to be sure whether the pictures were by them or not; the seller could not be taken to have asserted *a fact*, but had merely expressed *his opinion* on the subject; therefore he had not warranted (*l*).

Questions of construction.

Difficult questions of construction frequently arise when a horse is sold with a warranty. In one case the receipt ran as follows:—

"*Received of Mr. Budd* £10 *for a grey four-year-old colt, warranted sound in every respect.*"

It was held that this warranty referred only to the *soundness*, and that the *age* was mere matter of description (*m*). In another case the seller of a mare said "*he never warranted, he wouldn't even warrant himself; but the mare was sound to the best of his knowledge.*" It was held that he must be taken to have warranted that the mare was sound *to the best of his knowledge* (*n*).

Obvious defects.

A general warranty does not extend to *obvious defects* (*o*). If I

(*i*) 56 & 57 Vict. c. 71. An affirmation made upon the sale or letting of real property as to the then state of the property may amount to a warranty, provided the like conditions exist as in the case of a warranty upon the sale of a chattel: De Lassalle *v.* Guildford, [1901] 2 K. B. 215; 70 L. J. K. B. 533.

(*k*) Power *v.* Barham (1836), 4 Ad. & E. 473; 6 N. & M. 62.

(*l*) Jendwine *v.* Slade (1797), 2 Esp. 572; 5 R. R. 754.

(*m*) Budd *v.* Fairmaner (1831), 8 Bing. 48; 5 C. & P. 78.

(*n*) Wood *v.* Smith (1829), 5 M. & Ry. 124; 4 C. & P. 45; and see per Lord Cairns, Ward *v.* Hobbs (1878), 4 App. Cas. 13; 48 L. J. C. P. 281.

(*o*) Margetson *v.* Wright (1832), 8 Bing. 454; 5 M. & P. 606.

sell you a horse warranting that it is sound and perfect in every respect when both of us can see it has no tail, you cannot bring an action against me for breach of warranty on the ground of the missing appendage. If, however, the defect, though obvious, is yet not of a permanently injurious character, it will be covered by a general warranty. A man once sold a race-horse to a sporting attorney with a warranty of soundness, though the horse was obviously suffering from a splint. But some splints cause lameness and others do not, and, as it was uncertain what would be the result in this case, the warranty was held to extend to it. Moreover, however obvious a defect may be, if the seller agrees to deliver the horse all right at the end of a particular period, the warranty will include the defect (*p*). A person who takes a horse with a warranty—it has been held in a case where a man bought a horse with "an extraordinary convexity of the cornea of the eye" which produced short-sightedness and made the animal liable to shy,—is not bound to use extreme diligence in discovering defects (*q*).

Qualified warranty.

The seller may, of course, place limitations on the warranty he gives. At a horse repository, for instance, there was a notice on a board to the effect that warranties given at that establishment should remain in force only till twelve o'clock the next day unless in the meantime the purchaser sent in a certificate of unsoundness. It was held that purchasers who were aware of it were bound by this notice (*r*). A similar condition was held binding on the purchaser in the case of Hinchcliffe *v.* Barwick (*s*), where, however, there were no words limiting the duration of the warranty, but the horse was to be returned by a particular time the next day and then tried.

What is soundness.

The term "sound" in the warranty of a horse or other animal implies the absence of any disease, or seeds of disease, which actually diminishes, or in its progress will diminish, its natural usefulness in the work to which it would properly and ordinarily be applied (*t*). A temporary lameness has been held to be unsoundness (*u*); so has a cough (*x*). But mere badness of shape is not

(*p*) Liddard *v.* Kain (1824), 2 Bing. 183; 9 Moore, 356.

(*q*) Holliday *v.* Morgan (1858), 1 E. & E. 1.

(*r*) Bywater *v.* Richardson (1834), 1 Ad. & E. 508; 3 N. & M. 748.

(*s*) (1880), 5 Ex. Div. 177; 49 L. J. Ex. 495; and see Chapman *v.* Withers (1888), 20 Q. B. D. 824; 57 L. J. Q. B. 457.

(*t*) Kiddell *v.* Burnard (1842), 9 M. & W. 668; 11 L. J. Ex. 268.

(*u*) Elton *v.* Brogden (1815), 4 Camp. 281.

(*x*) Coates *v.* Stephens (1838), 2 M. & Rob. 157.

unsoundness (*y*); nor is roaring, unless symptomatic of disease (*z*). Crib-biting is not unsoundness, but vice (*a*). A nerved horse is unsound (*b*). So is a chest-foundered horse (*c*).

Remedies for breach of warranty.

A breach of warranty on the sale of a specific chattel does not entitle the buyer to reject and return the article. His remedy is either to sue the seller for damages, or to set off the breach when an action is brought against him for the price (*d*). If, however, the subject-matter of the sale is not in existence or not ascertained at the time of the contract, he may refuse to accept an article not in accordance with the description stipulated for. To entitle him, however, thus to return the goods and rescind the contract, he must be careful not to make any further use of them than is necessary to give them a fair trial. If the purchaser sues upon the warranty, he need not return the article sold (*e*). See also Wagstaff *v.* Shorthorn Dairy Co. (*f*), where there was a sale of seed potatoes, and the potatoes were not up to the standard of the warranty. It was held that the purchaser was entitled to the difference in value between the crop actually produced and the crop that would have been produced if the warranty had been complied with, if it were a reasonable thing for the purchaser to plant the seed without examination.

Warranty must be during Treaty for Sale.

[57] HOPKINS *v.* TANQUERAY. (1854)

[15 C. B. 130; 23 L. J. C. P. 162.]

Mr. Tanqueray advertised his horse "California" for sale at Tattersall's. The day before the sale, happening to go there, he found his friend Hopkins kneeling down

(*y*) Dickinson *v.* Follett (1833), 1 M. & Rob. 299; 42 R. R. 801.

(*z*) Bassett *v.* Collis (1810), 2 Camp. 524; 11 R. R. 786. See, however, Onslow *v.* Eames (1817), 2 Stark. 81; 19 R. R. 680.

(*a*) Scholefield *v.* Robb (1839), 2 M. & Rob. 210.

(*b*) Best *v.* Osborne (1825), Ry. & M. 290; 2 C. & P. 74.

(*c*) Atterbury *v.* Fairmanner (1823), 8 Moore, 32.

(*d*) Street *v.* Blay (1831), 2 B. & Ad. 456; 36 R. R. 626; and see sect. 53 of the Sale of Goods Act, 1893.

(*e*) Fielder *v.* Starkin (1788), 1 H. Bl. 17; 2 R. R. 700; Pateshall *v.* Tranter (1835), 3 Ad. & E. 103; 4 N. & M. 649.

(*f*) (1884), 1 C. & E. 324.

and carefully scrutinizing "California's" legs, whereupon he remarked, "*My dear fellow, you needn't examine his legs; you have nothing to look for; I assure you he's perfectly sound in every respect;*" to which Hopkins replied, "If you say so, I am perfectly satisfied," and immediately got up. The next day Hopkins attended the sale, and bought the horse, having, as he said, determined to do so because of Tanqueray's positive assurance that he was sound. There was no written warranty, and it was admitted that when Tanqueray said the horse was sound he quite believed it was. Hopkins now sought to make out that Tanqueray's assertion on the day before the sale was equivalent to a warranty. It was held, however, that that assertion *formed no part of the contract of sale*, and therefore did *not* amount to a warranty.

Previous representations cannot be relied on as a warranty.

The plaintiff made no imputation of *fraud* here. He sued *in contract, not in tort*, his point being that, notwithstanding the reticence of the auctioneer at the time the horse was put up, what the defendant had said to him on *the day before the sale* amounted to a warranty. But a warranty must be given, if at all, *at the time of the sale*. Representations and assertions made *before* it, unless continuing, or bottomed in fraud, are no good (*g*).

Warranty given afterwards requires new consideration.

So, too, a warranty given *after* a sale is void unless there is a new consideration; for the first consideration is exhausted by the transfer of the chattel without a warranty (*h*). "It frequently happens that persons (not lawyers) hardly consider this: they quote all the seller or dealer says as he buttons up the cheque in his pocket, as if that could in any way be a warranty.

Horse dealing.

Some dealers and horse-sellers say all sorts of things when coping or selling a horse, but they confine themselves to puff, and never commit themselves to any statement of a fact as to the subject of the deal. It is not until the bargain is entirely over that they comfort the buyer by statements which he fondly looks upon as warranties, but which cannot be so considered" (*i*).

Oral representations cancelled

When the terms of a contract have been reduced into writing, no oral repre-

(*g*) See Ormrod *v.* Huth (1845), 14 M. & W. 651; 14 L. J. Ex. 366. See also Cowdy *v.* Thomas (1877), 36 L. T. N. S. 22.

(*h*) Roscorla *v.* Thomas (1842), 3 Q. B. 234; 2 G. & D. 508.

(*i*) Lascelles on Horse Warranty, p. 34 (2nd ed.).

by written contract.

sentations can be relied on as a warranty. The written contract shortens and corrects the representations, so that whatever terms are not contained in the document must be struck out of the transaction (*k*). But a mere memorandum, not intended to be final, will not exclude oral evidence of a warranty. Thus, in Allen *v.* Pink (*l*), where a paper was signed by the vendor and given to the vendee containing "*Bought of G. Pink a horse for the sum of* £7 2*s.* 6*d.*" it was held that evidence might be given of a contemporaneous warranty. "The general principle stated by Mr. Byles," said Lord Abinger, C. B., "is quite true, that if there has been a parol agreement, which is afterwards reduced by the parties into writing, that writing alone must be looked to to ascertain the terms of the contract. But the principle does not apply here. There was no evidence of any agreement by the plaintiff that the whole contract should be reduced into writing by the defendant. The contract is first concluded by parol, and afterwards the paper is drawn up which appears to have been meant merely as a memorandum of the transaction, or an informal receipt for the money, not as containing the terms of the contract itself."

Allen *v.* Pink.

Implied Warranty of Title.

[58] MORLEY *v.* ATTENBOROUGH. (1849)

[3 Exch. 500; 18 L. J. Ex. 148.]

The defendant in this case was a pawnbroker. A person named Poley having hired a harp of Messrs. Chappell, music sellers, pledged it with the defendant for £15 15*s.*, on the terms that if the sum advanced were not repaid within six months he should be at liberty to sell it. The harp not being redeemed within the stipulated time, Attenborough sold it to the plaintiff. All this came to the ears of Messrs. Chappell, who got back their harp from

(*k*) Pickering *v.* Dowson (1813), 4 Taunt. 779; 39 R. R. 656.

(*l*) (1838), 4 M. & W. 140; 1 H. & H. 207.

Morley; and that gentleman, to recoup himself, now brought an action against the pawnbroker, alleging that the harp was sold to him with an implied warranty of title. This view, however, did not prevail, for the judges decided that in the absence of an express warranty all that the pawnbroker asserted by his offer to sell was that the thing had been pledged to him and was unredeemed, not that he was the lawful owner.

The leading case (which was followed in Bagueley *v.* Hawley) (*m*) was the chief authority for the supposed rule that *on the sale of a chattel personal there is no implied warranty of title.* The rule, however, was said to be pretty well "eaten up by the exceptions" (*n*). For example, the sale of goods *in a shop, or in a warehouse*, was held to import an implied warranty of title; and, indeed, Mr. Benjamin, in his book on the Sale of Personal Property, went so far as to state the effect of Eicholtz *v.* Bannister (*o*) (where a Manchester job warehouseman in his warehouse sold the plaintiff a quantity of woollen goods which he described as "a job lot just received by him") to be that "*the sale of a personal chattel implies an affirmation by the vendor that the chattel is his, and therefore he warrants the title*, unless it be shown by the facts and circumstances of the sale that the vendor did not attend to assert ownership, but only to transfer such interest as he might have in the chattel sold" (*p*). And this view of the law has now been adopted in the Sale of Goods Act, 1893 (*q*), s. 12, which provides that:—"In a contract of sale, *unless the circumstances of the contract are such as to show a different intention*, there is—

Rule strictly limited.

Eicholtz *v.* Bannister.

Sale of Goods Act, 1893.

(1.) An implied condition on the part of the seller that, in the case of a sale, he has a right to sell the goods, and that, in the case of an agreement to sell, he will have a right to sell the goods at the time when the property is to pass:

(2.) An implied warranty that the buyer shall have and enjoy quiet possession of the goods:

(*m*) (1867), L. R. 2 C. P. 625; 36 L. J. C. P. 328.

(*n*) Per Lord Campbell in Sims *v.* Marryat (1851), 17 Q. B. 291.

(*o*) (1864), 17 C. B. N. S. 708; 34 L. J. C. P. 105. See also the case of Raphael *v.* Burt (1884), 1 C. & E. 325, where there was held to be an implied warranty of title on the sale of some American bonds, which turned out to have been stolen.

(*p*) Benj. Sale of P. P. p. 634 (4th ed.).

(*q*) 56 & 57 Vict. c. 71.

(3.) An implied warranty that the goods shall be free from any charge or incumbrance in favour of any third party, not declared or known to the buyer before or at the time when the contract is made."

As to what circumstances are such as "to show a different intention," reference should be made (in addition to Morley *v.* Attenborough, and Bagueley *v.* Hawley, *supra*) to Chapman *v.* Speller (*r*), where it was held that on the sale of a forfeited pledge by a pawnbroker, the seller must be considered as undertaking merely that the subject of sale is a pledge, and is irredeemable, and that he *does not know of* any defect of title. A "different intention" may also be inferred from the nature of the subject-matter sold, *e.g.*, a patent right (*s*). And it should be observed that the implied condition and warranties arising under the above section may be negatived or varied not only by the circumstances, but also by the terms, express or implied, of the contract, under sect. 55 of the same Act, which provides that "Where any right, duty, or liability would arise under a contract of sale by implication of law, it may be negatived or varied by express agreement or by the course of dealing between the parties, or by usage, if the usage be such as to bind both parties to the contract." The effect of this latter section is to preserve intact the general principles and rules of construction applicable to contracts, and concisely expressed in the three maxims, "*modus et conventio vincunt legem*"; "*expressum facit cessare tacitum*"; "*in contractis tacite insunt quæ sunt moris et consuetudinis.*"

Sale by pawnbroker.

Patent.

Implied Warranties.

[59] **JONES *v.* JUST.** (1868)

[L. R. 3 Q. B. 197; 37 L. J. Q. B. 89.]

Jones & Co., Liverpool merchants, agreed to buy from Just, a London merchant, a number of bales of Manilla hemp which were expected to arrive in some ships from

(*r*) (1850), 14 Q. B. 621; 19 L. J. Q. B. 239. See also Peto *v.* Blades (1814), 5 Taunt. 657; 15 R. R. 609.

(*s*) Hall *v.* Conder (1857), 2 C. B. N. S. 22; 26 L. J. C. P. 138, 288; Smith *v.* Neale (1857), 2 C. B. N. S. 67; 26 L. J. C. P. 143.

Singapore. The hemp did arrive, but when it was examined, it was found to be so much damaged that it would not pass in the market as Manilla hemp; and Jones & Co., who had paid the price before the ships arrived, had to sell it at 75 per cent. of the price which similar hemp would have realised if undamaged. This was an action by them against the seller, who was admitted to have acted quite innocently in the matter, to recover the difference; and it was held that he must pay it, on the ground that in every contract to supply goods of a specified description, which the buyer has no opportunity of inspecting, the goods must not only correspond to the specified description, but *must also be saleable or merchantable under that description.*

Caveat emptor.

The maxim *caveat emptor* generally applies as to the quality of goods sold, and unless there is an *express* warranty there is none.

But a warranty is *implied* in the following cases:—

Particular purpose.

(1.) When goods are sold by a trader *for a particular purpose* of which he is well aware—*e.g.*, copper for sheathing a ship,—so that the buyer necessarily trusts to the judgment or skill of the seller, they must be reasonably fit for the purpose (*t*).

Bigge *v.* Parkinson.

A case often referred to is Bigge *v.* Parkinson (*u*), where a provision dealer had undertaken to supply a troop-ship with stores for a voyage to Bombay, guaranteed to pass the survey of certain officers, but with no warranty of their being fit for the purpose. It was held, however (in spite of the guarantee), that such a warranty must be implied.

The burst water bottle.

In the recent case of Preist *v.* Last (*x*), the plaintiff, a draper, went to the shop of the defendant, a chemist, and asked for a "hot-water bottle." An article was shown to him as such. He inquired whether it would stand boiling water, and the defendant

(*t*) Jones *v.* Bright (1829), 5 Bing. 533; 3 M. & P. 155; Gray *v.* Cox (1825), 4 B. & C. 108; 8 D. & R. 220. See sect. 14 (1) of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), and note the proviso that "in the case of a contract for the sale of a specified article *under its patent or other trade name*, there is no implied condition as to its fitness for any particular purpose." And see the recent Scotch case of Paul *v.* Glasgow Corporation (1901), 3 F. 119.

(*u*) (1862), 7 H. & N. 955; 31 L. J. Ex. 301.

(*x*) [1903] 2 K. B. 148; 72 L. J. K. B. 657.

told him that it was meant for hot water, but would not stand boiling water. He then purchased it. Some days afterwards the bottle, while in use by the plaintiff's wife, burst, and she was in consequence scalded. The plaintiff sued for breach of warranty that the bottle was fit for use as a hot-water bottle, and judgment was given in his favour.

Gillespie v. Cheney.

And although the contract of sale is in writing and contains no mention of the particular purpose for which the goods are required, still verbal evidence is admissible to show that prior to the making of the contract the buyers made known that purpose to the sellers and relied on their skill and judgment, so as to raise the implication of the condition specified in sect. 14 of the Sale of Goods Act, namely, that the goods should be reasonably fit for such purpose (*y*).

Food.

But in the case of the sale of meat in a market, which the buyer inspects and selects himself, there is generally no implied warranty of fitness for human food (*z*). The butcher, however, might be liable in tort to the customer if the bad meat made him ill (*a*). And in the recent Irish case of Wallis *v.* Russell (*b*), a fishmonger was held liable in damages to a customer who became seriously ill through eating crabs which were not fit for human food; the ground of the decision being, that the crabs were bought for a particular purpose, made known to the seller, within sect. 14 (1) of the Sale of Goods Act, 1893, under such circumstances as to show that the buyer relied on the seller's skill and judgment.

The implied warranty of this class covers latent undiscoverable defects (*c*).

Manufactured goods. Mody *v.* Gregson.

(2.) When the contract is to furnish *manufactured goods*, they must be of a merchantable quality (*d*).

And this is so *even when the sale is by sample*. Grey shirtings were delivered according to sample, but it was then discovered that 15 per cent. of china clay had been introduced into the fabric, rendering it unmerchantable. The presence of the china clay could not have been detected by an ordinary examination of the sample; and it was therefore held that an action could be maintained for breach of an implied warranty of merchantable quality (*e*).

(*y*) Gillespie *v.* Cheney, [1896] 2 Q. B. 59; 65 L. J. Q. B. 552.

(*z*) Emmerton *v.* Matthews (1862), 7 H. & N. 586; 31 L. J. Ex. 139; Smith *v.* Baker (1879), 40 L. T. 260.

(*a*) Burnby *v.* Bollett (1847), 16 M. & W. 644; 17 L. J. Ex. 190.

(*b*) [1902] 2 Ir. R. 585.

(*c*) Randall *v.* Newson (1877), 2 Q. B. D. 102; 45 L. J. Q. B. 364.

(*d*) Laing *v.* Fidgeon (1815), 6 Taunt. 108; 4 Camp. 169.

(*e*) Mody *v.* Gregson (1868),

In the absence of usage, there is an implied contract by a manufacturer who sells goods that they are of *his own make;* so that he would not be justified in supplying equally excellent articles made by some other manufacturer (*f*). Johnson *v.* Raylton.

(3.) In the case of a *sale by sample*, there is an implied condition that (a) the bulk shall correspond with the sample in quality; (b) the buyer shall have a reasonable opportunity of comparing the bulk with the sample; (c) the goods shall be free from any defect rendering them unmerchantable, which would not be apparent on reasonable examination of the sample (*g*). Sample.

But no further warranty (unless it would have arisen if the sale had not been by sample) is implied. In the well-known case of Parkinson *v.* Lee (*h*), the defendant sold the plaintiff a quantity of hops by sample. The bulk fairly answered to the sample, but both sample and bulk had a latent defect which made the purchase useless to the plaintiff. It was held that there was no implied warranty that the hops were merchantable or good for anything. "Here," said Lawrence, J., "was a commodity offered for sale, which might or might not have a latent defect. This was well known in the trade; and the plaintiff might, if he pleased, have provided against the risk by requiring a special warranty. Instead of which, a sample was fairly taken from the bulk, and he exercised his own judgment upon it." Parkinson *v.* Lee.

(4.) The *custom* of a particular trade may raise an implied warranty (*i*). Custom.

(5.) Under the circumstances of the leading case, that is to say, where goods are sold by *description*, there is an implied condition not only that they answer the description (*k*), but that they are of merchantable quality; and if the sale be by sample, as well as by description, it is not sufficient that the bulk of the goods corresponds with the sample, if the goods do not also correspond with the description (*l*). But if the buyer has examined the goods, there is Sale by description.

L. R. 4 Ex. 49; 38 L. J. Ex. 12; and see Heilbutt *v.* Hickson (1872), L. R. 7 C. P. 438; 41 L. J. C. P. 228; Drummond *v.* Van Ingen (1887), 12 App. Cas. 284; 56 L. J. Q. B. 563; Jones *v.* Padgett (1890), 24 Q. B. D. 650; 59 L. J. Q. B. 261.

(*f*) Johnson *v.* Raylton (1881), 7 Q. B. D. 438; 50 L. J. Q. B. 753. See, however, the dissentient judgment of Bramwell, L. J.

(*g*) Sale of Goods Act, 1893, s. 15 (2). A contract of sale is a contract for sale by sample, where there is a term in the contract, express or implied, to that effect.

(*h*) (1802), 2 East, 314; 6 R. R. 429.

(*i*) Jones *v.* Bowden (1813), 4 Taunt. 847; 14 R. R. 683; and see sects. 14 and 55 of the Sale of Goods Act, 1893.

(*k*) See Vigers *v.* Sanderson, [1901] 1 K. B. 608; 70 L. J. K. B. 383.

(*l*) See the Sale of Goods Act, 1893, ss. 13 and 14. See Varley *v.* Whipp, [1900] 1 Q. B. 513; 69

then no implied condition as regards defects which such examination ought to have revealed (*m*).

But it is not an implied term in the contract that the thing sold shall be fit for the purpose for which it is required (*n*).

Trade marks.

(6.) By the 17th section of the Merchandise Marks Act, 1887 (*o*), a warranty of genuineness is to be implied from a trade mark or description.

Fertilisers and feeding stuffs.

(7.) By the Fertilisers and Feeding Stuffs Act, 1893 (*p*), the invoice which the seller of manufactured or artificially prepared fertilisers or feeding stuffs is now bound to give to the purchaser, is declared to have effect as a warranty of the statements contained therein, and also on the sale of an article for use as food for cattle there is implied a warranty by the seller that the article is suitable for feeding purposes.

As to implied warranties on the letting of land or houses, see Smith *v.* Marrable, *post*, p. 257.

A dangerous tin of powder.

Where the vendor of a tin containing disinfectant powder knew that it was likely to cause danger to a person opening it, unless special care was taken, and the danger was not such as presumably would be known to or appreciable by the purchaser, unless warned by it, the Court of Appeal recently held that, independently of any warranty, there was cast upon the vendor a duty to warn the purchaser of the danger (*q*).

Blackfriars Bridge.

In 1864 the Corporation of London wanted to take down Blackfriars Bridge, and build a new one. Accordingly, they prepared plans and a specification, and invited tenders. A Mr. Thorn contracted to do the work and set about it. But when he had got some way, it turned out that a part of the plan, which consisted in the use of caissons, could not be adopted, and finally Thorn found it necessary to go to law with the corporation for the loss of time and trouble occasioned by the failure of the caissons. It was held, however, that there was no implied warranty that the bridge could be built according to the plans and specification (*r*).

Longer voyage than expected.

In another case, the plaintiff, a master mariner, had agreed with the defendants for a lump sum to take a certain specified steam-tug

L. J. Q. B. 333, as to what is a "sale by description" within sect. 13. See also Wren *v.* Holt, [1903] 1 K. B. 610; 72 L. J. K. B. 340.

(*m*) Sale of Goods Act, 1893, s. 14 (2).

(*n*) Chanter *v.* Hopkins (1838), 4 M. & W. 406; 1 H. & H. 377; Ollivant *v.* Bayley (1843), 5 Q. B. 288; 13 L. J. Q. B. 34.

(*o*) 50 & 51 Vict. c. 28.

(*p*) 56 & 57 Vict. c. 56, ss. 1 and 2.

(*q*) Clarke *v.* Army and Navy Co-operative Society, Limited, [1903] 1 K. B. 155; 72 L. J. K. B. 153.

(*r*) Thorn *v.* London (1876), 1 App. Cas. 120; 45 L. J. Ex. 487.

of theirs, towing six barges, from Hull to the Brazils, he paying the crew and providing food for all on board for seventy days. It was held that there was no implied undertaking by the defendants that their steam-tug was reasonably efficient for the purposes of the voyage, and that the master mariner had no remedy against them, though it turned out that the engines of the vessel were so defective that the voyage occupied a great deal more time than it ought to have done (*s*). See also the case of Hall *v.* Billingham (*t*), where it was held (under 37 & 38 Vict. c. 51, s. 4) that in every case of a contract for the sale of a chain cable, whether for use on a British ship or not, there is an implied warranty that it has been properly tested and stamped. Chain cables.

Warranties and Representations.

BEHN *v.* BURNESS. (1863) [60]

[3 B. & S. 751; 32 L. J. Q. B. 204.]

This was an action by a shipowner against a charterer for not loading. In the charter-party the plaintiff had described himself as "owner of the good ship or vessel called the *Martaban*, of 420 tons or thereabouts, *now in the port of Amsterdam*." Unfortunately, the good ship the *Martaban* was *not* just then "in the port of Amsterdam"; and the question was, whether the words were a condition or merely a representation. It was held that they were a condition precedent, and therefore that the plaintiff had not fulfilled his part of the contract.

In the judgment in the leading case, representations are defined as "statements or assertions made by the one party to the other, before or at the time of the contract, of some matter or circumstance relating to it." Now it is clear law (*u*) that an action of Definition of representations.

(*s*) Robertson *v.* Amazon, &c. Co. (1881), 7 Q. B. D. 598; 51 L. J. Q. B. 68.

(*t*) (1885), 34 W. R. 122; 54 L. T. 387.

(*u*) See per Jessel, M. R., Smith *v.* Chadwick (1884), 20 Ch. D. 27, at p. 44; 9 App. Cas. 187; 53 L. J. Ch. 873.

deceit will lie when the plaintiff has been induced to enter into a contract by representations of the defendant which were false in fact and which were also false to the knowledge of the defendant, or were recklessly made by him. But if a person is induced to enter into a contract by a false statement carelessly made by one who honestly believes it to be true, the validity of the contract can be impeached only if it is made a *condition* of the contract (*x*). If it is so made a condition, the contract, being conditional upon its truth, cannot, of course, be enforced by the party from whom the untrue statement proceeded. This observation may be well illustrated by the important case of Bannerman *v.* White (*y*), an action by a hop-grower against a hop-merchant for the price of hops sold to the latter. The Burton brewers, rightly or wrongly, considered that the quality of their beer had deteriorated through the use of sulphur in the cultivation of hops, and had the year before sent a circular round to all the growers saying that they would not buy any more hops which had had sulphur applied to them. This being so, at the very commencement of the negotiations between the plaintiff and the defendant, the latter asked the former if any sulphur had been used, adding that, if any had, he must decline to consider any offer. The plaintiff replied that none had been used, and so the defendant agreed to purchase the year's crop. As a matter of fact, the plaintiff had used sulphur to about five acres of the hops (the whole growth being 300 acres), having done so for the purpose of trying a new machine called a sulphurator; and had afterwards mixed the sulphured and unsulphured hops all up together. It may be taken that there was no fraudulent intention on the part of the plaintiff. The effect of the finding of the jury was that the defendant required and the plaintiff gave his undertaking that no sulphur had been used. "This undertaking," said Erle, C. J., in delivering the decision of the Court, "was a preliminary stipulation, and if it had not been given, the defendant would not have gone on with the treaty which resulted in the sale. In this sense *it was the condition upon which the defendant contracted.*" It was held, therefore, that, as the plaintiff had not fulfilled the condition, he could not enforce the sale.

What amounts to a condition.

Bannerman *v.* White

But it may be, too, that a representation is of such a nature and made under such circumstances as to amount to a *warranty*. And this is a very different thing from a *condition* in the strict legal meaning of the term, although no doubt some confusion has arisen

Representation amounting to warranty.

(*x*) See Peek *v.* Derry (1890), 14 App. Cas. 337; 58 L. J. Ch. 864; but see Angus *v.* Clifford, [1891] 2 Ch. 449; 60 L. J. Ch. 443.

(*y*) (1861), 10 C. B. N. S. 844; 31 L. J. C. P. 28.

from a careless interchange of the two words. A *warranty*, though part of the contract, is really in itself *a separate and distinct undertaking* that a particular representation shall be true, and, if in the end it proves to be untrue, the remedy is for breach of this agreement of warranty, so that the original contract is not thereby avoided as it would be on the non-performance of a *condition*.

Sale of Goods Act, 1893, s. 11.

And, "where a contract of sale is subject to any condition to be fulfilled by the seller, the buyer may waive the condition, or *may elect to treat the breach of such condition as a breach of warranty*, and not as a ground for treating the contract as repudiated" (*z*).

"Whether a stipulation in a contract of sale is a *condition*, the breach of which may give rise to a right to treat the contract as repudiated, or a *warranty*, the breach of which may give rise to a claim for damages, but not to a right to reject the goods and treat the contract as repudiated, depends in each case on the construction of the contract. A stipulation *may be a condition though called a warranty* in the contract" (*a*).

Bentson *v.* Taylor

The case of Bentson *v.* Taylor (*b*) is an excellent illustration of the law discussed in Behn *v.* Burness; and the following extract from the judgment of Bowen, L. J., deserves careful attention:—

"When a contract is entered into between two parties, every representation made at the time of the entering into the contract may or may not be intended as a warranty, or as a promise that the representation is true. When the representation is not contained in the written document itself, it is for the jury to say whether the real representation amounted to a warranty. . . . But when you have a representation made in a written document, it is obviously no longer for the jury, but for the Court, to decide whether it is a mere representation, or whether it is what is called (I admit not very happily) a 'substantive part of the contract,' that is, a part of the contract which involves a promise in itself. It might be necessary to take the opinion of the jury on matters of fact which would throw light on the construction, but the question of construction itself would remain until the end of the case for the Court to decide. But, assuming the Court to be of opinion that the statement made amounts to a promise, or, in other words, a substantive part of the contract, it still remains to be decided by the Court, as a matter of construction, whether it is such a promise

(*z*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 11 (1) (a).

(*a*) *Ib.* s. 11 (1) (b). See Kidston *v.* Monceau Ironworks (1902), 86 L. T. 556; 7 Com. Cas. 82.

(*b*) [1893] 2 Q. B. 274; 63 L. J. Q. B. 15.

as amounts merely to a warranty, the breach of which would sound only in damages, or whether it is that kind of promise the performance of which is made a condition precedent to all further demands under the contract by the person who made the promise against the other party—a promise the failure to perform which gives to the opposite party the right to say that he will no longer be bound by the contract. . . . There is no way of deciding that question except by looking at the contract in the light of the surrounding circumstances, and then making up one's mind whether the intention of the parties, as gathered from the instrument itself, will best be carried out by treating the promise as a warranty sounding only in damages, or as a condition precedent by the failure to perform which the other party is relieved of his liability. In order to decide this question of construction, one of the first things you would look to is, to what extent the accuracy of the statement—the truth of what is promised—would be likely to affect the substance and foundation of the adventure which the contract is intended to carry out. There, again, it might be necessary to have recourse to the jury."

Relief on equitable grounds.

There exists, too, a large class of cases in which relief is given on equitable grounds to persons induced to enter into agreements on the faith of innocent misrepresentations. These are cases in which one party to the contract has, from the nature of the transaction, special and peculiar means of knowledge (*c*) as to the subject-matter from which the other party is excluded, *e.g.* (*d*), agreements for the sale of landed property (*e*), or contracts for marine insurance. In many instances of this kind, the mere omission to state material facts is in itself sufficient to enable the deceived party to release himself from his obligation.

(*c*) As to the case where plaintiff had means of discovering that the representation was untrue, see Redgrave *v.* Hurd (1881), 20 Ch. D. 1; 51 L. J. Ch. 113.

(*d*) Phillips *v.* Caldcleugh (1868), L. R. 4 Q. B. 159; 38 L. J. Q. B. 68.

(*e*) Proudfoot *v.* Montefiore (1867), L. R. 2 Q. B. 511; 36 L. J. Q. B. 225.

Implied Warranty on letting Furnished House.

SMITH *v.* MARRABLE. (1843) [61]

[11 M. & W. 5; 12 L. J. Ex. 223.]

"5, *Brunswick Place, Sept.* 19, 1842.

"*Lady Marrable informs Mrs. Smith that it is her determination to leave the house in Brunswick Place as soon as she can take another, paying a week's rent, as all the bedrooms occupied but one are so infested with bugs that it is impossible to remain.*"

And in pursuance of this determination, the Marrables moved out, and Smith went to law with them, alleging that as they had taken the house for five weeks they had no right to leave in this summary fashion, bugs or no bugs. The Marrables, on the other hand, successfully contended that *it is an implied condition in the letting of a furnished house that it shall be reasonably fit for habitation*, and that, if it is not fit, the tenant may quit without notice.

The famous bug case, after having been disrespectfully spoken of for many years, was in 1877 expressly affirmed by the case of Wilson *v.* Finch Hatton (*f*), where its principle was applied to defective drainage.

Exception to rule.

It is to be observed that it is only in the case of *furnished* houses that reasonable fitness is an implied condition. In general, in the absence of deceit, there is no such implied condition by the lessor of land or houses (*g*), nor that he will do any repairs (*h*), nor even that the house will endure during the term. "A landlord who lets a house in a dangerous state," said Erle, C. J., in Robbins *v.* Jones (*i*), "is not liable to the tenant's customers or guests for

(*f*) (1877), 2 Ex. Div. 336; 46 L. J. Ex. 489.

(*g*) Keates *v.* Cadogan (1851), 10 C. B. 591; 20 L. J. C. P. 76.

(*h*) Gott *v.* Candy (1853), 2 E. & B. 847; 23 L. J. Q. B. 1.

(*i*) (1863), 15 C. B. 221, at p. 240; 33 L. J. C. P. 1. See also the recent case of Lane *v.* Cox, [1897] 1 Q. B. 415; 66 L. J. Q. B. 193.

accidents happening during the term; for, fraud apart, there is no law against letting a tumble-down house." See, however, the 12th section of the Housing of the Working Classes Act, 1885 (48 & 49 Vict. c. 72), with regard to houses let for habitation by persons of the working classes at a low rent (*k*). In the case of Manchester Bonded Warehouse Co. *v.* Carr (*l*), where a building had fallen in consequence of a floor being overloaded with flour, and rent was claimed by the lessors during the time the building was unoccupied, the Court said distinctly, "We are not prepared to extend these decisions [viz., Smith *v.* Marrable, and Wilson *v.* Finch Hatton] to ordinary leases of lands, houses, or warehouses, as we must if we are to hold the plaintiffs liable for the fall of this warehouse by reason of any implied covenant or warranty." Another attempt to extend the liabilities of landlords was made in Anderson *v.* Oppenheimer (*m*), where the tenant of the ground floor and basement of a house in Cannon Street, let out in flats to different tenants, tried unsuccessfully to get damages under a *covenant for quiet enjoyment* for the bursting of a water pipe and consequent injury to his goods. In Powell *v.* Chester (*n*) the grievance was that there was an insufficient water supply, but Bacon, V.-C., declined to apply the principle of Smith *v.* Marrable to the facts of the case. Indeed, his judgment shows a disposition to limit the application of the principle as much as possible. And this disposition was re-affirmed by the Court of Appeal in the recent case of Sarson *v.* Roberts (*o*), where it was held that on the letting of furnished lodgings there is *no implied warranty that the lodgings shall continue fit for habitation during the term.*

Attempts to increase liabilities of landlords.

Covenant by landlord to repair.

It may be mentioned that when the lessor has covenanted to keep the demised premises in repair during the term, he is entitled to *notice of want of repair* (*p*). It has been held that under a covenant to keep the demised premises in repair, the lessor is not bound to *cleanse an ornamental piece of water* in the grounds (*q*). And even when the landlord is bound to do the repairs, there is no implied condition that the tenant may quit if the repairs are not done (*r*); nor may he do them himself and deduct the amount from his rent (*s*).

(*k*) Walker *v.* Hobbs (1889), 23 Q. B. D. 458; 38 W. R. 63.

(*l*) (1880), 5 C. P. D. 507; 49 L. J. C. P. 809.

(*m*) (1880), 5 Q. B. D. 602; 49 L. J. Q. B. 708. See also the recent case of Blake *v.* Woolf, [1898] 2 Q. B. 426; 67 L. J. Q. B. 813.

(*n*) (1885), 52 L. T. 722; Hugall *v.* McLean (1885), 53 L. T. 94; 33 W. R. 588.

(*o*) [1895] 2 Q. B. 395; 65 L. J. Q. B. 37.

(*p*) Makin *v.* Watkinson (1870), L. R. 6 Ex. 25; 40 L. J. Ex. 33.

(*q*) Bird *v.* Elwes (1868), L. R. 3 Ex. 255; 37 L. J. Ex. 91.

(*r*) Surplice *v.* Farnsworth (1844), 7 M. & G. 576; 13 L. J. C. P. 215.

(*s*) Weigall *v.* Waters (1795), 6 T. R. 488.

Life Insurance.

HEBDON *v.* WEST. (1863) [62]

[3 B. & S. 579; 32 L. J. Q. B. 85.]

This was an action against an insurance society. The plaintiff had been for many years a clerk in a bank at Preston, and had proved very useful to his employers, of whom Pedder was the senior and managing partner. Pedder was much pleased with the man, and promised him two things,—one, that he would not, during his life, enforce payment of a debt of £4,000 which Hebdon owed the bank, and the other that he would pay him an increased salary of £600 a year during the next seven years. Hebdon obtained Pedder's permission to insure the latter's life in respect of these promises, and the chief question now was whether he had such a pecuniary interest in Pedder's life as to satisfy 14 Geo. 3, c. 48. It was held that in respect of the £600 a year salary he had, but not in respect of the other promise. It was held also that *a person cannot recover from an insurance company more than the amount of his insurable interest* in the life of the person insured.

DALBY *v.* INDIA AND LONDON LIFE INSURANCE CO. (1854) [63]

[15 C. B. 365; 24 L. J. C. P. 1.]

The effect of this case is to overrule Godsall *v.* Boldero (*t*), and to decide that *a contract of life insurance is not, like that*

(*t*) (1807), 9 East, 72. See some interesting remarks of Lord Blackburn on this case in Burnand *v.* Rodocanachi (1882), 7 App. Cas.

of fire or marine insurance, a contract of indemnity merely, but entitles the assured to receive the exact sum for which he has insured, no matter how much in excess of his real loss it may be.

Necessity for "interest."

14 Geo. 3, c. 48, s. 1, provides that no insurance shall be made by any person on the life of another, unless the person for whose sake the policy is made has *an interest* in that life.

What then is an "interest"? (*a*).

Who has "interest."

In the first place, a man is presumed to have an interest in his own life. But, on the other hand, if it can be shown that he is insuring his life with another person's money, and for that other's benefit, the policy will be void, for it is then nothing better than an attempt to evade the statute (*x*).

Creditor.

A creditor may insure his debtor's life, and, even though the debt is afterwards paid, may recover the money from the insurance office (*y*).

Cestui que trust.

A *cestui que trust* may insure the life of his trustee (*z*), and a wife her husband's (*a*).

Husband and wife.

A husband is not presumed to have such an interest in his wife's life. The "Married Women's Property Act, 1882" (*b*), gives power to a married woman to effect a policy on her own or her husband's life for her separate use, and provides that, if a husband insures his life in a policy expressed on the face of it to be for the benefit of his family, it shall create a trust for them (*c*).

Murderer cannot take benefit.

In the case of Cleaver *v.* Mutual Reserve Fund (*d*), a husband, having insured his life for the benefit of his wife, died, and his wife was convicted of his murder. It was held that the effect of sect. 11 of the above Act was to create a trust in favour of the wife in respect of the sum insured, but that, inasmuch as it was against public policy for the wife to benefit by her own criminal act, the trust in her favour failed, and a resulting trust arose in favour of the deceased husband's estate, in respect of which his executors were entitled to recover the sum insured from the insurance company.

Father.

But,

333, at p. 440; 51 L. J. Q. B. 548.

(*u*) Lucena *v.* Crawford (1808), 2 N. R. 302; 1 Taunt. 325; Wilson *v.* Jones (1867), L. R. 2 Ex. 139; 36 L. J. Ex. 78.

(*x*) Wainwright *v.* Bland (1836), 1 M. & W. 32; 5 L. J. Ex. 147; Shilling *v.* Accidental Death Ins. Co. (1857), 2 H. & N. 42; 27 L. J. Ex. 17.

(*y*) Anderson *v.* Edie (1852), 2 Park, Ins. 914 (8th ed.).

(*z*) Collett *v.* Morrison (1851), 9 Hare, 162; 21 L. J. Ch. 878.

(*a*) Reed *v.* Roy. Exch. Co. (1796), Peake, Ad. Ca. 70.

(*b*) 45 & 46 Vict. c. 75, s. 11, re-enacting 33 & 34 Vict. c. 93, s. 10; and see as to this *In re* Sontar's Policy Trust (1884), 26 Ch. D. 236; 54 L. J. Ch. 256.

(*c*) But see *In re* Scottish Equitable Life Assce. Soc., [1902] 1 Ch. 282; 71 L. J. Ch. 189.

(*d*) [1892] 1 Q. B. 147; 61 L. J. Q. B. 128.

generally, the interest required by the statute is a *pecuniary* interest (*e*); and therefore an insurance by a father in his own name on the life of his son, he having no pecuniary interest in the continuance of it, is void (*f*). The fact that a person will at some future date be under a moral, though not a legal, obligation to pay for the funeral expenses of a relative is not sufficient to create an insurable interest in that relative's life (*g*). Where the agent of an insurance company, in good faith and believing his statement to be true, told the plaintiff that an insurance effected by him upon the life of his mother would be valid, and the plaintiff, relying upon that representation, effected an insurance with the defendants on his mother's life, and paid premiums thereunder, the policy being illegal and void for want of an insurable interest, he was held entitled to assume that the agent would have a knowledge of insurance law, and therefore the parties were not *in pari delicto*, and the premiums could consequently be recovered back (*g*).

Name.

The name of the party interested must be inserted in the policy (*h*).

Time at which interest must exist.

The time at which the required interest must exist is *the time of the entering into the contract*. It may have ceased at the time of the death, but the insurance office will nevertheless be bound to pay the money, for, as already stated, life insurance is not a mere contract of indemnity. But, as we have also seen already, a man cannot recover more than the amount of his insurable interest at the time of the contract. He could not, for instance, insure with half a dozen different offices and recover the money from all of them. This is the effect of the construction placed by Hebdon *v.* West on sect. 3 of 14 Geo. 3, c. 48.

Assignment of life policy.

A life policy may be assigned either by indorsement or by a separate instrument, and the assignee may sue in his own name without showing any interest of his own; but a written notice of the assignment must be given to the insurance company (*i*). In

(*e*) See Barnes *v.* London, Edinburgh and Glasgow Assur. Co., [1892] 1 Q. B. 864.

(*f*) Halford *v.* Kymer (1830), 10 B. & C. 724; 34 R. R. 553. But see Worthington *v.* Curtis (1875), 1 Ch. D. 419; 45 L. J. Ch. 259; where it was decided that the contract is only void as between the insurance company and the insurer. See also Att.-Gen. *v.* Murray, [1903] 2 K. B. 64.

(*g*) Harse *v.* Life Assurance Co., [1903] 2 K. B. 92; 72 L. J. K. B. 638.

(*h*) 14 Geo. 3, c. 48, s. 2. As to whether an insurance against disease is a "policy" within this Act, see Carlill *v.* Carbolic Smoke Ball Co., [1893] 1 Q. B. 256; 62 L. J. Q. B. 257.

(*i*) 30 & 31 Vict. c. 144. See also 51 Vict. c. 8, s. 19, which provides that an assignment must be duly stamped before the assurer can pay any claim arising under it.

Newman *v.* Newman.

the case of Newman *v.* Newman (*k*), it was held that the Act which requires this notice is intended to apply only as between the insurance office and the persons interested in the policy, and does not affect the rights of those persons *inter se;* so that where a first incumbrancer on a policy had not given such notice as prescribed by the Act, and a second incumbrancer with notice of the prior charge had given the statutory notice, it was held that the second incumbrancer did not thereby obtain priority.

Friendly societies.

Policies of life insurance issued by a friendly society constituted under the Friendly Societies Acts, 1875 to 1896, are not assignable otherwise than by nomination according to the provisions of these Acts (*l*).

Construction of policies.

The case of South Staffordshire Tramways Co. *v.* Sickness and Accident Assurance Association (*m*) may be referred to on the construction of policies of life insurance. The plaintiffs, a tramway company, effected with the defendants an insurance against "claims for personal injury in respect of accidents caused by vehicles, for twelve calendar months from November 24, 1887," to the amount of "£250 in respect of any one accident." On November 24, 1888, one of the plaintiffs' tramcars was overturned, forty persons were injured, and the plaintiffs became liable to pay claims to the amount of £833. The Court decided, first, that the policy excluded November 24, 1887, but included November 24, 1888; and, secondly, that "accident" meant injury in respect of which a person claimed compensation from the plaintiffs, and that the liability of the defendants was consequently not limited to £250; and therefore the plaintiffs were entitled to recover the amount of £833.

Shock to the nerves.

Another recent case on this subject is that of Pugh *v.* L. B. & S. C. Ry. Co. (*n*), where it was held that a *shock to the nerves* of an employé *caused by fright* sustained in the discharge of his duty, and incapacitating him from employment, is an "accident" within the meaning of a policy issued by a railway company to such employé under which a weekly allowance is to be paid by the company in case of such employé "being incapacitated from employment by reason of accident sustained in the discharge of his duty in the company's service."

Days of grace.

During the subsistence of a policy of life insurance, one of the premiums was paid by an assignee of the policy within the stipulated days of grace, but at the time it was paid the assured had

(*k*) (1885), 28 Ch. D. 674; 54 L. J. Ch. 598.

(*l*) See *In re* Redman, [1901] 2 Ch. 471; 70 L. J. Ch. 669.

(*m*) [1891] 1 Q. B. 402; 60 L. J. Q. B. 47, 260. And see Hamlyn *v.* Crown Accidental Ins. Co., [1893] 1 Q. B. 750; 62 L. J. Q. B. 409.

(*n*) [1896] 2 Q. B. 248; 65 L. J. Q. B. 521.

been dead some hours, although this fact was not known to the assignee or to the insurance company. Under these circumstances it was recently held by the Court of Appeal (*o*) that, notwithstanding the death of the assured before payment of the premium, the insurance company was liable on the policy. And Mathew, L. J., expressly held that *payment of a premium at any time within the stipulated days of grace is equivalent to payment on the day when the premium became due.*

Conditions of life policy.

A person insuring his life has usually to answer a number of questions as to the state of his health, the illnesses he has had, &c. If it is made a condition of the policy that those questions shall be answered truly, the policy will become void even for immaterial and unintentional errors (*p*). In that case the truth of the declarations is the basis of the policy. If there is no such condition, the question is whether the concealment or misrepresentation was of a material fact (*q*). In the recent case of Biggar *v.* Rock Life Assurance Co. (*r*), an agent of an insurance company was allowed by a proposer to invent the answers to the questions which formed the basis of the contract of insurance, and to send them in as the answers of the proposer; and the Court held that for that purpose he was the agent of the proposer and not of the insurance company, and that the latter were not liable upon a claim under the policy by the proposer, even though he did not instruct or authorise the agent to make any false answer, and did not know that the agent had answered any questions falsely.

Suicide.

People who insure their lives should be careful to look at the conditions of a policy before signing it. A common condition in a policy is that it shall become void in the event of the insured committing suicide. As such a condition (according to the more accepted opinion) covers suicide while in a state of insanity (*s*), and as insanity is a disease from which even the most gifted are not exempt, any

(*o*) Stuart *v.* Freeman, [1903] 1 K. B. 47; 72 L. J. K. B. 1; distinguishing Pritchard *v.* Merchants', &c. Life Assurance Soc. (1857), 27 L. J. C. P. 169; 3 C. B. N. S. 622.

(*p*) Anderson *v.* Fitzgerald (1853), 4 H. L. C. 507; 17 Jur. 995; Thomson *v.* Weems (1884), 9 App. Cas. 671; 21 Sc. L. R. 791; London Guarantee Co. *v.* Fearnley (1880), 5 App. Cas. 911; 43 L. T. 390; Hambrough *v.* Mutual Life Insurance Co. of New York (1895), 72 L. T. 140.

(*q*) London Assurance Co. *v.* Mansel (1879), 11 Ch. D. 363; 48 L. J. Ch. 331. And see Grogan's case (1885), 53 L. T. 761.

(*r*) [1902] 1 K. B. 516; 71 L. J. K. B. 79.

(*s*) Clift *v.* Schwabe (1846), 3 C. B. 437; 17 L. J. C. P. 2; and see Borradaile *v.* Hunter (1843), 5 M. & G. 639; 12 L. J. C. P. 225. See also Horn *v.* Anglo-Australian Life Assurance Co. (1861), 30 L. J. Ch. 511; 4 L. T. 143; Dufaur *v.* Professional Life Co. (1858), 25 Beav. 602; 27 L. J. Ch. 817.

more than they are from colds or fevers, a wise man will draw his pen through it.

Winspear's case.

This branch of the subject is well illustrated by the cases of Winspear *v.* Accident Insurance Co. (*t*), and Lawrence *v.* Accidental Insurance Co. (*u*). In the former case a man had effected an insurance against death by accidental injury, but the policy contained a proviso that the insurance should not extend "*to any injury caused by or arising from natural disease or weakness or exhaustion consequent on disease.*" During the time this policy was in force, the insured, whilst crossing the river at Edgbaston, was seized with an epileptic fit, and fell into the water and was drowned. It was held that the executrix could recover on the policy, in spite of the proviso.

Lawrence's case.

In the other case, a man who had effected a policy with much the same kind of proviso was taken ill on the platform at Waterloo, and fell in a fit on to the line, where an engine passed over and killed him. On the authority of Winspear's case, it was held that the insurance company were not protected by their proviso. "We must look," said Watkin Williams, J., "at only the immediate and proximate cause of death, and it seems to me to be impracticable to go back to cause upon cause, which would lead us back ultimately to the birth of the person, for if he had never been born, the accident would not have happened." These two cases should, however, be compared with the more recent one of Isitt *v.* Railway Passengers' Assurance Co. (*x*), where a person who had died from pneumonia, owing to cold caught while confined in his room by an "injury caused by accident," and who was more liable to catch cold and less capable of resisting illness through debility resulting from the accident, was held to have died from "the effects of such injury."

Isitt's case.

Independently of conditions, a policy is vitiated by felonious suicide, being killed in a duel, or being executed (*y*); as also by fraudulent misrepresentation or concealment of material facts at the time of effecting the policy.

Premiums not paid.

If the premium is not paid in the stipulated manner, the policy will become void. By receiving premiums, however, with full

(*t*) (1880), 6 Q. B. D. 42; 43 L. T. 459; and see Bawden *v.* London, Edinburgh and Glasgow Ass. Co., [1892] 2 Q. B. 534; 61 L. J. Q. B. 792.

(*u*) (1881), 7 Q. B. D. 216; 50 L. J. Q. B. 522.

(*x*) (1889), 22 Q. B. D. 504; 58 L. J. Q. B. 191. And see Mardorf *v.* Accident Insurance Co., [1903] 1 K. B. 584; 72 L. J. K. B. 362.

(*y*) Amicable Society *v.* Bolland (1830), 2 Dow & Cl. 1; 4 Bligh, N. S. 194. See also Cornish *v.* Accident Insurance Co. (1889), 23 Q. B. D. 453; 58 L. J. Q. B. 591.

knowledge of the breach, the insurers will be deemed to have waived the forfeiture (*z*).

In Leslie *v.* French (*a*), it was held that when a person, not the sole beneficial owner, pays the premium to keep up a policy of life insurance, he is entitled to a lien on the policy or its proceeds in the following cases:— Leslie *v.* French.

(1.) By contract with the beneficial owner.

(2.) By reason of the right of trustees to an indemnity out of their trust property for money expended by them in its preservation.

(3.) By subrogation to their right of some person who at the request of trustees has advanced money for the preservation of the property; and

(4.) By reason of the right of a mortgagee to add to his charge any money paid by him to preserve the property.

In no other cases can a lien on a policy for premiums paid be acquired either by a stranger or by a part owner of the policy.

Fire Insurance.

DARRELL *v.* TIBBITTS. (1880) [64]

[5 Q. B. D. 560; 50 L. J. Q. B. 33.]

A steam roller belonging to the Brighton Corporation was so heavy that it broke the gas pipes in a street, and caused an explosion in one of the houses. The tenants of the house obtained compensation from the Corporation for the damage so done and repaired the premises, as they were

(*z*) Wing *v.* Harvey (1854), 5 De G. M. & G. 265; 23 L. J. Ch. 511. See also Canning *v.* Farquhar (1886), 16 Q. B. D. 727; 58 L. J. Q. B. 225, where a man had died after the acceptance of his proposal, but before tender of the premium, and it was held that the assurers need not grant a policy. But see, on the other hand, Roberts *v.* Security Co., [1897] 1 Q. B. 111; 66 L. J. Q. B. 119; and London & Lancashire Life Assurance Co. *v.* Fleming, [1897] A. C. 499; 66 L. J. P. C. 116.

(*a*) (1883), 23 Ch. D. 552; 52 L. J. Ch. 762; Falcke *v.* Scottish Imperial (1886), 34 Ch. D. 234; 35 W. R. 143.

bound to do by the terms of their lease. But it happened that the landlord had insured the house with the plaintiffs by a policy against fire covering injury by gas explosion, and the plaintiffs, unaware that by the terms of the lease the lessees were bound to make good injuries done by an explosion of gas, paid the policy money. But when they heard that the tenants had put the house all right again, they claimed a return of their money; and they were held to be entitled to it, because *a policy of fire insurance is a contract of indemnity*. As was remarked by Brett, L. J., if the plaintiffs could not recover the money back, "the whole doctrine of indemnity would be done away with; the landlord *would be not merely indemnified, he would be paid twice over*."

Necessity for "interest."

Communication of material facts.

The person who effects an insurance against fire must have *an interest* in the property insured, and he cannot recover beyond his interest. It is his duty, when effecting the insurance, to communicate to the insurers all material facts (*b*); and it is an implied condition that his description of the property is accurate (*b*). But when payment is resisted by insurers on the ground of misrepresentation, the onus is on them to prove very clearly that such misrepresentation has been made. Thus, where a firm made a proposal in writing for a policy of fire insurance, and to the question "Has the proponent ever been a claimant on a fire insurance company?" answered "No," it was held that claims made by a member of the firm before he became a partner in it were not covered by the question, and that the answer was consequently not untrue (*c*). It is also an implied condition when a house is insured, that it *shall not be altered* so as to increase the risk (*d*). When a building in the metropolitan district is burnt down, any person interested may require the insurance money to be laid out in repairing or rebuilding the structure (*e*).

Alteration of premises.

Fires in London.

(*b*) Bufe *v.* Turner (1815), 6 Taunt. 338; 2 Marsh. 46; and see Lindenau *v.* Desborough (1828), 8 B. & C. 586; 3 C. & P. 353; Newcastle Fire Insurance Co. *v.* Macmorran (1815), 3 Dow, 255; 15 R. R. 67; and Bancroft *v.* Heath (1901), 6 Com. Cas. 137.

(*c*) Davies *v.* National Marine Insurance Co., [1891] A. C. 485; 60 L. J. P. C. 73.

(*d*) Sillem *v.* Thornton (1854), 3 E. & B. 868; 23 L. J. Q. B. 362.

(*e*) 14 Geo. III. c. 78, s. 83; and see the case of Anderson *v.* Commercial Union Assurance Co. (1885), 55 L. J. Q. B. 146; 34 W. R. 189.

In the case of Castellain *v.* Preston (*f*), a vendor had contracted with a purchaser for the sale, at a specified sum, of a house at Liverpool, which had been insured by the vendor with an insurance company against fire. The contract contained no reference to the insurance. After the date of the contract, but before the date fixed for completion, the house was damaged by fire, and the vendor received the insurance money from the company. The purchase was afterwards completed, and the purchase-money agreed upon, without any abatement on account of the damage by fire, was paid to the vendor. In an action by the company against the vendor, it was held that the company were entitled to recover a sum equal to the insurance money from the vendor for their own benefit. "Darrell *v.* Tibbitts," said Brett, L. J., "seems to me to be entirely in favour of the plaintiff in this case. I shall not retract from the very terms which I used in that case. It seems to me that in Darrell *v.* Tibbitts the insurers were not subrogated to a right of action or to a remedy. They were not subrogated to a right to enforce the remedy, but what they were subrogated into was the right to receive the advantage of the remedy which had been applied, whether it had been enforced or voluntarily administered by the person who was bound to administer it. . . . The contract in the present case, as it seems to me, does enable the assured to be put by the third party into as good a position as if the fire had not happened, and that result arises from the contract alone. Therefore, according to the true principles of insurance law, and in order to carry out the fundamental doctrine, namely, that the assured can recover a full indemnity, but shall never recover more, except perhaps in the case of the serving and labouring classes under certain circumstances, it is necessary that the plaintiff in this case should succeed. The case of Darrell *v.* Tibbitts has cut away every technicality which would prevent a sound decision. The doctrine of subrogation must be carried out to the full extent, and carried out in this case by enabling the plaintiff to recover." "On the principle of Darrell *v.* Tibbitts," said Cotton, L. J., "when the benefits afterwards accrued by the completion of the purchase the insurance company were entitled to demand that the money paid by them should be brought into account. Therefore the conclusion at which I have arrived is that, if the purchase-money has been paid in full, the insurance company will get back that which they have paid, on the ground that the subsequent payment of the price which had been before agreed upon, and the contract for payment of which was existing at the time, must be

Castellain *v.* Preston.

(*f*) (1883), 11 Q. B. D. 380; 52 L. J. Q. B. 366.

brought into account by the assured, because it diminishes the loss against which the insurance office merely undertook to indemnify them." "The answer to the question raised before us," said Bowen, L. J., "appears to me to follow as a deduction from the two propositions, first, that a fire insurance is a contract of indemnity, and secondly, that when there is a contract of indemnity no more can be recovered by the assured than the amount of his loss."

West of England Fire Ins. Co. *v.* Isaacs.

A policy of fire insurance being a contract of indemnity merely, the insurer, on making good the loss insured against, is entitled to recover from the assured, not only the value of any benefit received by him by way of compensation from other sources in excess of his actual loss, but also the full value of any rights or remedies of the assured against third parties, including any which may have been renounced by him and to which, but for such renunciation, the insurer would have a right to be subrogated (*g*).

Midland Insurance Company *v.* Smith.

Another case of much interest is Midland Insurance Co. *v.* Smith (*h*), where an insurance company granted a fire policy to a man named Smith, and during the currency of the policy, Mrs. Smith feloniously burnt the property insured. It would appear from this case that a felonious burning by the wife of the assured, without his privity, is covered by the ordinary fire policy.

Forfeiture for not insuring.

It is a common covenant in a lease that the lessee will keep the premises insured. Such a covenant runs with the land. If it is broken, relief against the forfeiture will generally be granted the first time of breaking, where no loss by fire has happened, and there is an insurance on foot at the time of the application for relief (*i*).

Damage done by Fire Brigade.

By the Metropolitan Fire Brigade Act, 1865 (*k*), s. 12, any damage occasioned by the Metropolitan Fire Brigade "in the due execution of their duties shall be deemed to be damage by fire within the meaning of any policy of insurance against fire."

(*g*) West of England Fire Insurance Co. *v.* Isaacs, [1897] 1 Q. B. 226; 66 L. J. Q. B. 36.

(*h*) (1881), 6 Q. B. D. 561; 50 L. J. Q. B. 329.

(*i*) See 22 & 23 Vict. c. 35, ss. 4 and 6; and see 44 & 45 Vict. c. 41, s. 14; Quilter *v.* Mapleson (1882), 9 Q. B. D. 672; 52 L. J. Q. B. 44.

(*k*) 28 & 29 Vict. c. 90.

Concealment from Marine Insurers.

CARTER *v.* BOEHM. (1763) [65]

[1 W. Bl. 594; 3 Burr. 1905.]

The governor of Fort Marlborough, in the island of Sumatra in the East Indies, came to the conclusion that there was considerable danger of his fort being captured. He therefore wrote to his brother in England, and asked him to get the fort insured for a year. The brother accordingly went to Boehm & Co., who insured Fort Marlborough against capture by "a foreign enemy" between October 16th, 1759, and October 16th, 1760. In April, 1760, the fort was captured by the French, and this action was brought to recover the insurance money. The insurers declined to pay, on the ground that certain material facts contained in two letters which the governor had written to his brother in September, 1759, had been concealed from them. In those letters the governor spoke of the weakness of his fort, and the probability of the French attacking it. It appeared, however, that the fort was little more than a factory, being *merely intended for defence against the natives, so that its weakness was an immaterial fact as regarded the French*, while the probability of their attacking it was a question which a person in England was in a better position to determine than the governor himself. Boehm & Co., therefore, were ordered to pay.

On the principle that the minds of the contracting parties are not *ad idem*, the concealment, whether wilful or accidental, of a material fact vitiates a policy of marine insurance. Everything that can increase the risk insured must be communicated (*l*); and it

What must be told.

(*l*) Stribley *v.* Imp. Mar. Ins. Co. (1876), 1 Q. B. D. 507; 45 L. J. Q. B. 396.

makes no matter that the fact was once actually known to the underwriter if it was not present to his mind at the time of effecting the insurance. A man once insured a merchant ship with an insurance office without telling them that she was identical with a once well-known and formidable Confederate cruiser. It was astonishing that they did not remember it. But the shipowner's omission to tell them was held to be fatal to his success on the policy (*m*). The rule on the subject has been stated in a later case to be that, while it would be too much to put on the assured the duty of disclosing everything which might influence the mind of an underwriter, "*all should be disclosed which would affect the judgment of a rational underwriter governing himself by the principles and calculations on which underwriters do in practice act*" (*n*). So the non-disclosure of the charterers' power to cancel the charter, whereby the shipowners might lose the freight, has been held to be an answer to an action on a policy (*o*). But, on the other hand, the party effecting the policy is not bound to disclose mere rumours, even if they have appeared in the newspapers, nor such things as it is the business of the underwriters to find out for themselves, such as the usage of trade, the dangers of particular seas and rivers, or the probabilities of hostilities (*p*). Nor need the insured communicate matter which forms an ingredient in a warranty, *e.g.*, that of seaworthiness (*q*).

The converted cruiser.

What need not be told.

By mercantile usage the slip, though not admissible in evidence as a contract (*r*), is treated as the contract for insurance. Therefore facts which have come to the knowledge of the assured *after the slip is signed, but before the policy is completed*, need not be communicated (*s*). Whether any particular fact was "material" or not is a question for the jury. The point is not free from doubt, but *probably* on such an inquiry *skilled witnesses, having no interest in the matter litigated, can be called* to say that, if they had been the underwriters, they would or would not have been materially influenced by this or that fact (*t*).

The slip.

Opinion of expert.

(*m*) Bates *v.* Hewitt (1867), L. R. 2 Q. B. 595; 36 L. J. Q. B. 282.

(*n*) Ionides *v.* Pender (1874), L. R. 9 Q. B. 531; 43 L. J. Q. B. 227; and see Rivaz *v.* Gerussi (1880), 6 Q. B. D. 222; 50 L. J. Q. B. 176; Tate *v.* Hyslop (1885), 15 Q. B. D. 368; 54 L. J. Q. B. 592.

(*o*) Mercantile Steamship Co. *v.* Tyser (1881), 7 Q. B. D. 73; 29 W. R. 790.

(*p*) Gandy *v.* Adelaide Co. (1871), L. R. 6 Q. B. 746; 40 L. J. Q. B. 239; but see Harrower *v.* Hutchinson (1870), L. R. 5 Q. B. 584; 39 L. J. Q. B. 229.

(*q*) Haywood *v.* Rodgers (1804), 4 East, 590; 1 Smith, 289; Knight *v.* Cotesworth (1883), 1 C. & E. 48.

(*r*) 30 & 31 Vict. c. 23, s. 7.

(*s*) Cory *v.* Patton (1874), L. R. 9 Q. B. 577; 43 L. J. Q. B. 181; and see Morrison *v.* Univ. Mar. Ins. Co. (1873), L. R. 8 Ex. 197; 42 L. J. Ex. 115.

(*t*) Berthon *v.* Loughman (1817),

A firm of brokers, having instructions to insure an overdue vessel, received a confidential communication to the effect that the vessel was lost, whereupon they discontinued their negotiations and put their principal and the underwriters in direct communication, but did not inform them that the vessel was lost. The principals then effected an insurance with the same underwriters for £800, and also through other brokers, with other underwriters, one for £700. It was held that the latter policy was valid and binding on the insurers, but that the former could not be enforced. Blackburn *v.* Vigors (1887), 12 Ap. Cas. 531; 57 L. J. Q. B. 114; Blackburn *v.* Haslam (1888), 21 Q. B. D. 144; 57 L. J. Q. B. 479. Knowledge of agent.

There is a rule of law, founded on mercantile custom, that the broker, and not the assured, is liable to the underwriter for the premium upon a policy of marine insurance. And this rule has been held to apply even though the policy contains an express promise by the assured to pay the premium to the underwriter (*u*). Broker liable for premium.

Abandonment to Underwriters.

ROUX *v.* SALVADOR. (1836) [66]

[3 Bing. N. C. 266; 7 L. J. (N. S.) Ex. 328.]

In consequence of a leak in the ship that was carrying them, a cargo of hides began to putrefy, and it became obvious that, *as hides*, they would never reach the journey's end. Under these circumstances they were sold at an intermediate port, and fetched less than a fourth of their value. Happily for the owner, they were insured; and it was held that he *could claim for a total loss without an abandonment* (*x*).

A total loss may be *actual* or *constructive*. It is *actual* when no part of the subject-matter of the insurance exists in such a state as Actual total loss.

2 Stark. 258; Rickards *v.* Murdock (1830), 10 B. & C. 527; 8 L. J. K. B. 210; but see Campbell *v.* Rickards (1833), 5 B. & Ad. 840; 2 N. & M. 542.

(*u*) Universo Ins. Co. of Milan *v.* Merchants' Marine Ins. Co., [1897] 2 Q. B. 93; 66 L. J. Q. B. 564.

(*x*) And see Asfar *v.* Blundell, [1896] 1 Q. B. 123; 65 L. J. Q. B. 138.

to serve any useful purpose. There is, of course, an actual total loss when the insured ship is consumed by fire, or destroyed by perils of the sea. But there is also an actual total loss if it is reduced to a mere wreck or congeries of planks (*y*), or if an insured cargo is so damaged as to exist only in the shape of a nuisance (*z*).

Constructive total loss.

A *constructive* total loss arises whenever the nature of the loss is such as to give reasonable ground to the assured for relinquishing the voyage altogether. The proper test for ascertaining whether or not a ship has become a constructive total loss has been stated as follows: To establish such a loss it must be shown that a shipowner of ordinary prudence and uninsured would not have gone to the expense of raising and repairing the vessel, because her market value when raised and repaired would probably be less than the cost of restoration (*a*). The attitude the assured takes up towards the underwriters is of this kind,—"It is true my goods still exist; but look at their condition. It is really not worth my while to have them forwarded to their destination. My enterprise is practically a failure. I will have the policy money, and you can have these damaged goods to make what you can out of them." This is called *abandonment*, and is required by law as a condition of the assured's claiming for a constructive total loss. It is only fair, because otherwise he would be reaping an undue benefit from what is merely a contract of indemnity. Notice of abandonment must be given within a reasonable time after the assured has received intelligence of the loss (*b*). But notice of abandonment of freight need not be given to underwriters if the circumstances are such that the underwriters could do nothing if such notice were given to them (*c*). An abandonment may be made orally (*d*); but it must be certain (*e*), unconditional (*f*), and of the whole thing insured (*g*). On the other hand, if the underwriter means to dispute the matter, he must say so within a reasonable time after receiving notice of abandonment (*h*). In the case of Forwood *v.*

Abandonment.

Notice.

(*y*) Cambridge *v.* Anderton (1824), 2 B. & C. 691; 1 C. & P. 213; Levy & Co. *v.* The Merchant Mar. Ins. Co. (1885), 1 C. & E. 474; 52 L. T. 263.

(*z*) Dyson *v.* Rowcroft (1803), 3 B. & P. 474; 7 R. R. 809.

(*a*) Per Lord Watson in The Blairmore, [1898] A. C. 593; 67 L. J. P. C. 96.

(*b*) Mitchell *v.* Edie (1787), 1 T. R. 608; 1 R. R. 318.

(*c*) Trinder, Anderson & Co. *v.* Thames and Mersey Marine Ins. Co., [1898] 2 Q. B. 114; 67 L. J. Q. B. 666.

(*d*) Read *v.* Bonham (1821), 2 B. & B. 147; 6 Moore, 397.

(*e*) Parmeter *v.* Todhunter (1808), 1 Camp. 541.

(*f*) McMasters *v.* Shoolbred (1794), 1 Esp. 237; 5 R. R. 735.

(*g*) Park, 229.

(*h*) Hudson *v.* Harrison (1821), 3 B. & B. 97; 6 Moore, 288.

The North Wales, &c. Co. (*i*), it was held that a constructive total loss was covered by a policy and bye-laws confining the insurance to "absolute damage caused by the perils insured against."

The abandonment, as a total loss, of a ship insured against war risks, which has been captured, is not defeated by the restoration of the ship at a date subsequent to the commencement of an action for total loss on the policy by the shipowners against the underwriters (*k*).

In the case of a policy of re-insurance, if a constructive total loss has happened, no notice of abandonment is necessary (*l*).

Return of Premium.

TYRIE *v.* FLETCHER. (1777) [67]

[COWP. 668.]

This was an action against an underwriter for a return of part of the premium paid for the insurance of a ship called the "Isabella." The ship was insured "*at and from London to any port or place where or whatsoever for twelve months from the* 19*th of August*, 1776, *to the* 19*th of August*, 1777, *both days inclusive, at* £9 *per cent. warranted free from captures and seizures by the Americans and the consequences thereof.*" The "Isabella" was captured by an American privateer about two months after she had sailed from London. It was held that the risk was entire and had commenced; therefore there could be no return of premium.

When a plaintiff fails to establish his right to recover on a policy

(*i*) (1880), 9 Q. B. D. 732; 49 L. J. Q. B. 593.

(*k*) Ruys *v.* Royal Exchange Assurance Corporation, [1897] 2 Q. B. 135; 66 L. J. Q. B. 534.

(*l*) Uzielli *v.* Boston Mar. Insurance Co. (1884), 15 Q. B. D. 11; 54 L. J. Q. B. 142; discussed in Western Assurance Co. of Toronto *v.* Poole, [1903] 1 K. B. 376; 72 L. J. K. B. 195.

of marine insurance, the question arises whether he is entitled to a *return of premium*.

Two rules are clear:—

Risk never commenced.

(1.) *Where the risk has not been run, the premium will be returned.* Thus, if the insured ship never sailed, or if the insured goods were never put on board, there must be a return (*m*). So, when only part of the goods embraced by the policy is put on board, a proportionate part of the premium must be returned (*n*). So, too, the premium may be recovered where the policy is rendered void *ab initio* through non-compliance with a warranty (*o*).

Risk once commenced. Stevenson *v.* Snow.

(2.) *Where the risk has once commenced, there can be no return of premium.* The well-known case of Stevenson *v.* Snow (*p*) is not really an exception to this rule. There the insurance was from London to Halifax, warranted to depart with convoy from Portsmouth. But when the ship got to Portsmouth the convoy had gone. It was held that there must be a part return of the premium for the risk never incurred, viz., that of the voyage from Portsmouth to Halifax. "*There are two parts*," said Lord Mansfield, "*in this contract, and the premium may be divided into two distinct parts, relative, as it were, to two voyages.*"

Fraud and illegality.

If the assured has been guilty of *fraud* (*e.g.*, if he knew the ship was lost when he insured her) he cannot claim a return of the premium, even though the risk never commenced (*q*).

So, where a policy is illegal, and the voyage has been performed, there can be no return, because *in pari delicto potior est conditio possidentis* (*r*). But while the illegal contract remains executory, there is a *locus pœnitentiæ*, and the assured may recover his premium on formally renouncing and retiring from the whole transaction (*s*).

(*m*) Martin *v.* Sitwell (1692), 1 Show. 151.

(*n*) Eyre *v.* Glover (1812), 16 East, 218; 3 Camp. 276; and see Horneyer *v.* Lushington (1812), 15 East, 46; 3 Camp. 85.

(*o*) Penson *v.* Lee (1800), 2 Bos. & P. 330; 5 R. R. 615.

(*p*) (1761), 3 Burr. 1237; 1 W. Bl. 315.

(*q*) Wilson *v.* Duckett (1762), 3 Burr. 1361; Cope *v.* Rowlands (1836), 2 M. & W. 149; 2 Gale, 231; and Allkins *v.* Jupe (1877), 2 C. P. D. 375; 46 L. J. C. P. 824.

(*r*) Lowry *v.* Bourdieu (1780), 2 Doug. 468; Paterson *v.* Powell (1832), 9 Bing. 320; 2 L. J. C. P. 13, 68; Herman *v.* Jeuchner (1885), 15 Q. B. D. 561; 54 L. J. Q. B. 340.

(*s*) See Palyart *v.* Leckie (1817), 6 M. & S. 290; 18 R. R. 381.

Deviation.

SCARAMANGA *v.* STAMP. (1880) [68]

[5 C. P. D. 295; 49 L. J. C. P. 674.]

The defendants' steamship "Olympias" was chartered by the plaintiff to carry a cargo of wheat from Cronstadt to Gibraltar. When nine days out she sighted another steamship, the "Arion," in distress, her machinery having completely broken down. The weather was fine and the sea smooth, so that the crew might easily have been taken off and saved; but the master of the "Arion," anxious to save his ship and cargo as well as the lives of his crew, agreed to pay the "Olympias" £1,000 to tow the ship into the Texel. Accordingly the "Olympias" took the "Arion" in tow, and, in so deviating from the ordinary course of her voyage, got ashore on the Terschelling Sands, and with her cargo was ultimately lost.

It was held that, as it was not reasonably necessary to take the "Arion" to the Texel in order to save the lives of those on board her, this deviation was unjustifiable, and therefore the plaintiff was entitled to recover the value of his cargo from the defendants as owners of the "Olympias."

Deviation to save life is justifiable.

Those in peril on the sea derive a substantial benefit from this case, which may be said to have distinctly decided that a *deviation for the purpose of saving life is justifiable*, though a deviation merely for the sake of saving *property* is not.

Necessity justifies deviation.

By deviation is meant a ship's intentional departing from the regular course of her journey, and (in the absence of agreement) it can only be justified by *overwhelming necessity*, *e.g.*, to get provisions, to avoid capture, to repair damage, or, according to the

leading case, to save life (*t*). The reason of the rule is that the assured has *no right to substitute a different risk* (*u*).

Consequences of improper deviation.

When a ship deviates unnecessarily, her owners are responsible for all loss, no matter how arising, that occurs during the deviation (*x*). But a deviation does not discharge the insurers from liability for previous loss (*y*).

Mere *intention to deviate* will not vitiate a policy (*z*).

Seaworthiness.

Another implied warranty, the breach of which will prevent the insured from recovering on a voyage policy, is that of *seaworthiness*. What is warranted is *not* that the ship *will continue*, but that she *is*, at the time of the effecting of the policy, seaworthy (*a*). The presumption is that a ship is seaworthy, but, if she goes wrong very shortly after sailing, the assured will be called on to show that it was from causes subsequent to the commencement of the voyage (*b*). A ship is not seaworthy if there is not a competent crew (*c*); but insufficient ventilation of a cattle ship and an insufficient supply of men to attend the cattle on board constitute a breach of the implied condition of seaworthiness (*d*). Seaworthiness, however, is a term of relative import; and, "where the nature of the adventure, and the size and class of vessel to be employed, are known to both parties, the implied warranty of the shipowner cannot be carried further than that he shall *do his utmost* to make the particular vessel as fit for the voyage as she can possibly be made" (*e*). There is no warranty of seaworthiness implied in a *time policy* (*f*).

Degrees of seaworthiness.

(*t*) See Urquhart *v.* Barnard (1809), 1 Taunt. 450; 10 R. R. 574; Phelps *v.* Hill, [1891] 1 Q. B. 605; 60 L. J. Q. B. 382.

(*u*) See African Merchants' Co. *v.* British Marine Insurance Co. (1873), L. R. 8 Ex. 154; 42 L. J. Ex. 60.

(*x*) Davis *v.* Garrett (1830), 6 Bing. 716; 4 M. & R. 540. See also Leduc *v.* Ward (1888), 20 Q. B. D. 475; 57 L. J. Q. B. 379; and Glynn *v.* Margetson, [1893] A. C. 351; 62 L. J. Q. B. 466.

(*y*) Green *v.* Young (1702), 2 Ld. Raym. 840.

(*z*) Kewley *v.* Ryan (1794), 2 H. Bl. 343; 3 R. R. 408; Hare *v.* Travis (1822), 7 B. & C. 14; 9 D. & R. 748.

(*a*) Dixon *v.* Sadler (1839), 5 M. & W. 405; 8 M. & W. 895.

(*b*) Watson *v.* Clark (1813), 1 Dow, 336; 14 R. R. 73; Pickup *v.* Thames Insurance Co. (1878), 3 Q. B. D. 594; 47 L. J. Q. B. 749; and Ajum Goolam Hossen *v.* Union Marine Insurance Co., [1901] A. C. 362; 70 L. J. P. C. 34.

(*c*) Clifford *v.* Hunter (1827), M. & M. 103; 3 C. & P. 16.

(*d*) Sleigh *v.* Tyser, [1900] 2 Q. B. 333; 69 L. J. Q. B. 626. And a stipulation in the policy that "the fittings and condition of the cattle to be approved by Lloyd's agent's surveyor," does not exclude the implied warranty (*ib.*).

(*e*) Add. Contr. 682 (8th ed.); and see Burges *v.* Wickham (1863), 33 L. J. Q. B. 17; 3 B. & S. 669; Clapham *v.* Langton (1864), 34 L. J. Q. B. 46; 10 L. T. 875.

(*f*) Gibson *v.* Small (1853), 4 H. L. Ca. 353; 17 Jur. 1131; Dudgeon *v.* Pembroke (1877), 2 App. Cas. 284; 46 L. J. Q. B. 409.

The Glenfruin.

In the salvage case of The Glenfruin (*g*), Butt, J., said: "I have always understood the result of the cases from Lyon *v.* Mells (1804), 5 East, 427; 1 Smith, 478, to Kopitoff *v.* Wilson (1876), 1 Q. B. D. 377; 45 L. J. Q. B. 436, to be that under his implied warranty of seaworthiness the shipowner contracts not merely that he will do his best to make the ship reasonably fit, but that she shall be reasonably fit for the voyage. Had those cases left any doubt in my mind, it would have been set at rest by the observations of some of the peers in the case of Steel *v.* State Line Steamship Co. (1877), 3 App. Cas. 72; 37 L. T. 333."

Salvage.

Salvage is the compensation which owners must make to those who by skill, enterprise and risk (*h*), have rescued their property from impending perils of the sea, or from the power of an enemy (*i*). The Court of Admiralty has jurisdiction over all claims to salvage. But cases below a certain amount and of inferior importance may be tried by county court judges or justices of the peace (*k*).

Amount payable.

There is no hard-and-fast rule as to the proportion of the saved property which will be awarded to the salvors, which depends upon the nature of the services rendered (*l*). The Court, in order to encourage the maintenance of vessels specially built and equipped for, and solely employed in, rendering salvage services, will take that factor into consideration and will be liberal in awarding salvage remuneration for services rendered by such vessels to a vessel which but for such services would have become a total loss (*m*). If the salvors have entered into an agreement with the owners as to the amount to be paid, they must be content to claim under that agreement, which will generally be enforced, although a hard bargain for the rescued (*n*). Passengers and crew are not

Pilots and passengers.

(*g*) (1885), 10 P. D. 103, at p. 108; 54 L. J. P. 49.

(*h*) See Aitchison *v.* Lohre (1879), 4 App. Cas. 755; 49 L. J. Q. B. 123.

(*i*) The principal statutes on the subject are (as to civil salvage) 17 & 18 Vict. c. 104, and (as to military salvage) 27 & 28 Vict. c. 25 (The Naval Prize Act, 1864).

(*k*) See, as to jurisdiction of justices, the case of The Mac (1882), 51 L. J. P. D. & A. 81.

(*l*) The Erato (1888), 13 P. D. 163; 57 L. J. P. 107. See The Minneapolis, [1902] P. 30; 71 L. J. P. 28.

(*m*) The Glengyle, [1898] P. 97; 67 L. J. P. 48; affirmed by the House of Lords, [1898] A. C. 519; 67 L. J. P. 87,—where it was held that the House will not interfere with the amount of an award for salvage services made by the Court below, even though the award be larger than their lordships would have granted if the question had come before them for assessment in the first instance.

(*n*) See, however, the case of The Mark Lane (1890), 15 P. D. 135; 63 L. T. 468, where the Court treated the agreement as inoperative, as having been made under compulsion; and see The Rialto, [1891] P. 175; 60 L. J. P. 71; and The Strathgarry (No. 2), [1895] P. 264; 72 L. T. 900.

generally entitled to salvage. Nor are pilots. Exceptional circumstances and services, however, may make a difference. "In order to entitle a pilot to salvage reward," said Brett, L. J., in the case of Akerblom *v.* Price (*o*), "he must not only show that the ship was in some sense in distress, but that she was in such distress as to be in danger of being lost, and such as to call upon him to run such unusual danger, or incur such unusual responsibility, or exercise such unusual skill, or perform such an unusual kind of service, as to make it unfair and unjust that he should be paid otherwise than upon the terms of salvage reward."

Lifeboat crew.

In the recent case of The Auguste Legembre (*p*) a steam tug belonging to the National Lifeboat Institution, and kept expressly to tow the lifeboat, proceeded with the lifeboat in tow to a vessel in distress. The tug took the vessel in tow, the lifeboat during the towage being made fast astern of the vessel. The lifeboat crew did not render any actual service, but were nevertheless held to be entitled to be rewarded as salvors.

Misconduct of salvors.

Wilful or criminal misconduct of salvors may work an entire forfeiture of salvage; and mere misconduct not criminal (*e.g.*, violent and overbearing conduct) will operate to induce the Court to diminish the amount payable (*q*).

It is to be observed that, to found an action for salvage, it is essential that something more than human life should be saved. If no property is saved there can be no action, for there is no personal liability to pay salvage, and the claim can only attach to the property saved (*r*).

In a most meritorious case of salvage, where a steamship which had got aground on the Shore of the Red Sea, ninety-five miles from Suez, in such a position that without help she must before many hours had elapsed have been lost with all hands on board her, was towed off the shore and to within a few miles of Suez by another steamship, the Court, on a value of £62,000, awarded the salvors £6,000 (*s*).

In The Sunniside (*t*), it was held that in an action of salvage evidence of the loss of earnings by, and of the cost of repairing damage done to, the salving vessel in consequence of rendering

(*o*) (1881), 7 Q. B. D. 129; 50 L. J. Q. B. 629. See also The Santiago (1900), 83 L. T. 439.

(*p*) [1902] P. 123; 71 L. J. P. 53.

(*q*) The Marie (1882), 7 P. D. 203; 5 Asp. M. C. 27.

(*r*) The Renpor (1883), 8 P. D. 115; 52 L. J. P. 49; The Annie (1887), 12 P. D. 50; 56 L. J. P. 70.

(*s*) The Lancaster (1883), 9 P. D. 14; 49 L. T. 705.

(*t*) (1883), 8 P. D. 137; 52 L. J. P. 76. And see The Baku Standard, [1901] A. C. 549; 70 L. J. P. C. 98.

salvage services is admissible. But these sums are to be regarded as elements for consideration in estimating the amount of the salvage award, and are not to be considered as fixed amounts to be awarded to the salvors.

See also the cases of The Livietta (1883), 8 P. D. 24; 5 Asp. M. C. 132; The Yan Yean (1882), 8 P. D. 147; 52 L. J. P. 67; and The Cheerful (where the rescuing vessel had done a great deal of work, but not much good) (1886), 11 P. D. 3; 55 L. J. P. 5.

It has been held that when a vessel stands by or renders services to another upon request, even though no benefit results from her so doing, she is entitled to salvage remuneration (*u*).

Salvage may be granted to the commander and crew of a Queen's ship, on the ground that they have rendered services in excess of their public duty, and thereby deserved remuneration (*x*).

Where, in pursuance of an agreement, a vessel towed a disabled ship towards port, but was compelled to leave her in a more dangerous position than before, whence she was afterwards rescued by another vessel, it was held that the former vessel was entitled to remuneration in respect of the work done, although not to salvage (*y*).

Average.

WHITECROSS WIRE CO. *v.* SAVILL. (1882) [69]

[8 Q. B. D. 653; 51 L. J. Q. B. 426.]

The defendants were the owners of a ship called the "Himalaya," which sailed from London for New Zealand with (amongst other things) some fencing wire of the plaintiffs on board. Whilst lying at her port of destination, and before she had discharged all her cargo, a fire broke out in the hold, and ship and cargo were in imminent danger of destruction. Rising to the occasion, the master

(*u*) The Cambrian (1898), 76 L. T. 501; 8 Asp. M. C. 263.
(*x*) Cargo ex Ulysses (1888), 13 P. D. 205; 58 L. J. P. 11.
(*y*) The Benlarig (1889), 14 P. D. 3; 58 L. J. P. 24.

had a quantity of water poured into the hold upon the wire, and so the fire was put out and the ship saved.

This was an action to recover a contribution by way of general average for the damage thus deliberately inflicted on the wire, and it was held that the claim was well founded.

Principle of general average.

It is sometimes essential to the safety of a ship and the success of the adventure to throw things overboard—in technical language, to *jettison* them. The sacrifice being for everybody's benefit, it would obviously be unjust that the whole loss should fall on the owner whose goods were selected. The loss, therefore, is rateably adjusted between all the owners; and this adjustment is called *general average* (*z*). And where there has been a general average sacrifice, the assured is not precluded from recovering upon a policy against general average losses due to perils of the sea by reason of the fact that he is owner of both ship and cargo, and that there can therefore be no contribution as between the two interests (*a*).

Only merchandise liable.

Only *merchandise*, however, is liable to contribution; therefore not passengers' wearing apparel, nor provisions, nor convicts (*b*).

Salvation of ship necessary.

Moreover, it is essential to the liability to pay a general average contribution that the ship should have been saved, and that the sacrifice should have materially conduced thereto; or, as Lord Tenterden has well put it, that the jettison should be "*the effect of danger and the cause of safety.*" The part of the cargo thrown overboard must also have been properly laden, *e.g.*, (unless warranted by usage) not on deck (*c*).

Masts and sails.

Masts and sails destroyed in consequence of having to carry an unusual press of sail (*e.g.*, as in Covington *v.* Roberts (*d*), to escape from a French privateer) are not subjects of general average; but if they have been deliberately cut away for the sake of saving the ship, they are (*e*). And when a ship or her tackle are intentionally

(*z*) For an exhaustive history of the law of general average, see the judgment of Watkin Williams, J., in Pirie *v.* Middle Dock Co. (1881), 43 L. T. 426.

(*a*) Montgomery *v.* Indemnity Mutual Marine Assurance Co., [1902] 1 K. B. 734; 71 L. J. K. B. 467; disapproving The Brigella, [1893] P. 189; 62 L. J. P. 81.

(*b*) Brown *v.* Stapyleton (1827), 4 Bing. 119; 12 Moore, 334. See also Royal Mail Steam Packet Co. *v.* English Bank of Rio de Janeiro (1887), 19 Q. B. D. 362; 57 L. J. Q. B. 31.

(*c*) Gould *v.* Oliver (1837), 4 Bing. N. C. 134; 5 Scott, 445; and see Wright *v.* Marwood (1881), 7 Q. B. D. 62; 50 L. J. Q. B. 643.

(*d*) (1806), 2 B. & P. N. R. 378.

(*e*) Birkley *v.* Presgrave (1801), 1 East, 220; 6 R. R. 256.

put to an abnormal use involving an extraordinary risk of injury for the purpose of saving ship and cargo from imminent peril, any consequent loss to the ship is the subject of general average contribution. Working the engines of a ship whilst she is fast ashore is an abnormal use of them. Consequently, coal consumed in so working the engines, or injury to the engines, is the subject of general average contribution (*f*). Incidental expenses may also be claimed. For instance, when a ship goes into port in consequence of an injury to her which is itself the subject of general average, the expenses of warehousing and reloading goods necessarily unloaded for the purpose of repairing the injury, and expenses incurred for pilotage and other charges on the vessel leaving the port, are also the subject of general average (*g*).

Incidental expenses.

The law on this subject was exhaustively considered in the case Svendsen *v.* Wallace (*h*) before the House of Lords. A ship on a voyage (from Rangoon to Liverpool) having sprung a dangerous leak, the captain, acting justifiably for the safety of the whole adventure, put into a port of refuge to repair. In port the cargo was reasonably, and with a view to the common safety of ship, cargo and freight, landed in order to repair the ship. The ship was repaired, the cargo reloaded, and the voyage completed. In an action by the shipowners against the cargo owners, it was held that the latter were not chargeable with a general average contribution in respect of the expenses of re-shipping the cargo.

Svendsen *v.* Wallace.

Expenses incurred by a ship for the benefit of the adventure, *though rendered necessary through the master's negligence*, may be the subject of a general average contribution (*i*).

For the purpose of ascertaining the amount to be contributed to in general average in the case of a ship which has suffered both particular and general average damage, and has been sold as a constructive total loss, the value of such ship is her value at the time immediately preceding the general average sacrifice in respect of which contribution is to be made, and such value is to be ascer-

Amount of contribution.

(*f*) English and American Shipping Co. *v.* Indemnity Mutual Marine Insurance Co., [1895] P. 125; 64 L. J. P. 62.

(*g*) Atwood *v.* Sellar (1880), 5 Q. B. D. 286; 49 L. J. Q. B. 515; Plummer *v.* Wildman (1815), 3 M. & S. 482; 16 R. R. 334; Power *v.* Whitmore (1815), 4 M. & S. 141; 16 R. R. 416. See, too, Anderson *v.* Ocean Steamship Co. (1884), 10 App. Cas. 107; 54 L. J. Q. B. 192; and McCall *v.* Houlder (1898), 66 L. J. Q. B. 408; 76 L. T. 469.

(*h*) (1885), 10 App. Cas. 404; 54 L. J. Q. B. 497; and see Rose *v.* Bank of Australasia, [1894] A. C. 687; 63 L. J. Q. B. 504; and Iredale *v.* China Traders' Insurance Co., [1900] 2 Q. B. 515; 69 L. J. Q. B. 783.

(*i*) See Milburn *v.* Jamaica Trading Co., [1900] 2 Q. B. 540; 69 L. J. Q. B. 860.

tained by deducting from the value of the ship at the time she left port the amount which it would have cost to repair the particular average damage, and also the amount which she fetched when sold as a constructive total loss (*k*).

Remedy over.

It is to be observed that a person who has been compelled to pay a general average contribution will generally have his remedy over against the underwriters, so that they are often really the interested parties in questions of general average.

Particular average.

Particular average is "a very incorrect expression used to denote every kind of partial loss or damage happening either to the ship or cargo from any cause whatever" (*l*). Such a loss rests where it falls. The ordinary form of policy on goods contains the following "memorandum" intended to protect the underwriter from liability for partial losses which might be claimed in respect of certain perishable commodities:—

The memorandum.

"*N.B.—Corn, fish, salt, fruit, flour and seed are warranted free from average, unless general, or the ship be stranded. Sugar, tobacco, hemp, flax, hides and skins are warranted free from average under £5 per cent., and all other goods, also the ship and freight, are warranted free from average under £3 per cent., unless general, or the ship be stranded*" (*m*).

The underwriter, then, agrees to be liable if the ship is "stranded." There has been much litigation on the question, What is a "stranding"? The leading case on the point is Wells *v.* Hopwood (*n*), where Lord Tenterden said that a vessel's taking the ground "under any *extraordinary circumstances* of time or place, by means of some unusual or accidental occurrence," will constitute a stranding. But it will not be a stranding if she takes the ground *in the ordinary course of navigation* (*o*). Thus, in the case of Letchford *v.* Oldham (*p*), where it appeared that the paddles of steamers leaving a harbour at low tide had caused an elevation and a hole, into which the vessel had pitched, it was held that there was no stranding. The striking on a rock is not a stranding unless the vessel thereby becomes stationary (*q*).

If there is a stranding the policy applies, though the loss was not really caused by it (*r*).

(*k*) Henderson *v.* Shankland, [1896] 1 Q. B. 525; 65 L. J. Q. B. 340.

(*l*) Abbott on Shipping, p. 497 (12th ed.).

(*m*) See Price *v.* A1 Ships Assoc. (1889), 22 Q. B. D. 580; 58 L. J. Q. B. 269; The Alsace Lorraine, [1893] P. 209; 62 L. J. P. 107.

(*n*) (1832), 3 B. & Ad. 20; 37 R. R. 307.

(*o*) Kingsford *v.* Marshall (1832), 8 Bing. 458; 1 M. & Scott, 657; Hearne *v.* Edmunds (1819), 1 B. & B. 388; 4 Moore, 15.

(*p*) (1880), 5 Q. B. D. 538; 49 L. J. Q. B. 458.

(*q*) MacDougle *v.* R. Exch. Ass. Co. (1815), 4 Camp. 283; 4 M. & S. 503.

(*r*) Per Lord Tenterden in Wells *v.* Hopwood, *supra*.

Suing on Quantum Meruit.

CUTTER *v.* POWELL. (1795) [70]

[6 T. R. 320; 3 R. R. 185.]

The defendant had a ship which was about to sail from Jamaica to England, and wanted a second mate. In answer to an advertisement a suitable person presented himself in the shape of Mr. T. Cutter, and the defendant gave him a note to this effect:—

"*Ten days after the ship, 'Governor Parry,' myself master, arrives at Liverpool, I promise to pay to Mr. T. Cutter the sum of* 30 *guineas, provided he proceeds, continues and does his duty as second mate in the said ship from hence to the port of Liverpool.*"

The ship set sail on July 31st and arrived at Liverpool on October 11th, but on the voyage Cutter died. He had gone on board on July 31st, and had performed his duty faithfully and well up to the time of his death, which occurred on September 20th,—that is to say, when more than two-thirds of the voyage was accomplished.

"In this case," said one of the judges, "the agreement is conclusive; the defendant only engaged to pay the intestate on condition of his continuing to do his duty on board during the whole voyage, and the latter was to be entitled either to 30 guineas or nothing; for such was the agreement between the parties" (*s*).

Entire contract.

An entire contract cannot be apportioned. An ironmonger once agreed to make some dilapidated chandeliers "complete" for £10. He set to work on them, and certainly very much improved them. But he did *not* make them "*complete*," and therefore he did not

(*s*) As to the rights of seamen in respect of wages, see the Merchant Shipping Act, 1894 (57 & 58 Vict. c. 60), ss. 155—163.

succeed in recovering a farthing, although it was quite clear that the work he had done was worth £5 at least (*t*). The principle of the leading case was recently applied in the case of Sumpter *v.* Hedges (*u*). The plaintiff, a builder, in consideration of a lump sum to be paid to him by the defendant, agreed to erect certain buildings upon the defendant's land. Before the completion of the buildings the plaintiff abandoned the contract, and thereupon the defendant took possession of the buildings which had been erected, and completed them himself. In an action by the plaintiff in respect of so much of the agreed work as had been executed before the abandonment of the contract to recover as for the value of work done and materials provided, it was held that, in the absence of evidence of a fresh agreement by the defendant to pay the plaintiff the value of the work done and materials provided prior to the abandonment of the original contract, the plaintiff was not entitled to recover; and that the mere fact of the defendant taking possession of the building and completing them himself was not evidence from which such a fresh agreement could be inferred.

Sumpter *v.* Hedges.

And where a contract provides for stipulated work at a lump sum, and such work is not done, but its equivalent or better work is effected, no claim for such substituted work can be sustained (*x*).

Retainer of solicitor.

The contract of a solicitor, who is retained in a common law action, is a special contract to carry it on to its termination, and if, before its termination, he refuses to act further, he cannot recover his costs, unless he has so refused for good cause and has given reasonable notice to his client (*y*).

Divisible contract.

But the case is different *when the contract is not entire, but divisible.* A shipwright agreed to put an old vessel into "thorough repair," nothing being said about the amount or mode of payment. The shipwright began the job, but getting distrustful of his employers, he declined to go on with it unless he was paid for what had already been done. He was successful in his demand, the Court distinguishing the case from Sinclair *v.* Bowles (*z*), on the ground that there the contract was to do a specific work for a specific sum, whereas here there was *nothing amounting to a contract to do the*

(*t*) Sinclair *v.* Bowles (1829), 9 B. & C. 92; 4 M. & R. 1; and see Needler *v.* Guest (1648), Aleyn, 9; Bates *v.* Hudson (1825), 6 D. & R. 3.

(*u*) [1898] 1 Q. B. 673; 67 L. J. Q. B. 545. See also Munro *v.* Butt (1858), 8 E. & B. 738; 4 Jur. (N. S.) 1231; and Pattinson *v.* Luckley (1875), L. R. 10 Ex. 330; 44 L. J. Ex. 180.

(*x*) Forman *v.* The Liddesdale, [1900] A. C. 190; 69 L. J. P. C. 44.

(*y*) See Underwood *v.* Lewis, [1894] 2 Q. B. 306; 64 L. J. Q. B. 60, and the cases there cited; also Court *v.* Berlin, *ante*, p. 91.

(*z*) *Supra.*

whole repairs and make no demand till they were completed (*a*). The workman, moreover, will not lose his pay because, while the goods are still in his custody, they are accidentally destroyed, so that the employer gets no benefit from the work (*b*).

Generally speaking, when the contract is entire, there are only two cases in which the plaintiff can demand payment on a *quantum meruit* without having wholly performed his part of the contract.

Employer breaking contract.

(1.) *Where the defendant has absolutely refused to perform, or has incapacitated himself from performing, his part of the contract.*

In such a case it is *not the plaintiff's fault* that he has not performed his part of the contract, and it would be obviously unjust that he should suffer by the faithlessness of the party he contracted with. A literary gentleman once undertook to write a treatise on Ancient Armour for the "Juvenile Library." But the "Juvenile Library" proved so little successful that its promoters resolved to abandon it, whereby the literary gentleman, who had taken several journeys to examine specimens of armour, and had written several chapters of his proposed work, was damnified to the extent of £50. It was held that, as the special contract was at an end and broken by the defendants, the plaintiff might sue on a *quantum meruit* (*c*).

Books for boys.

Japanese war-ship.

In O'Neil *v.* Armstrong (*d*) an English seaman contracted with the master of a war-ship, newly built in this country for the Japanese Government, to serve on board for a voyage from England to Japan for a fixed sum. During the voyage war was declared by Japan against China, and at Aden, the proclamation of British neutrality having been read to the crew, the seaman refused to continue the voyage. It was held that he could recover his wages for the *whole voyage*, on the ground that he was justified in leaving the ship, and that the master, being in the employ of the Japanese Government, was responsible for their act in declaring war, whereby the character of the intended voyage and its risks were entirely altered.

Employer adopting benefit.

(2.) *Where work has been done under a special contract, though not in strict accordance with its terms, and the defendant has derived a benefit from it under such circumstances as to raise an implied promise to pay for it.*

Refusal to accept.

In this case, however, the employer may refuse to accept the work done; it is only when he does accept and take the benefit of it that he may be sued on a *quantum meruit*, and if the work

(*a*) Roberts *v.* Havelock (1832), 3 B. & Ad. 404; 37 R. R. 452.

(*b*) Menetone *v.* Athawes (1764), 3 Burr. 1592; but see Appleby *v.* Myers (1867), L. R. 2 C. P. 651; 36 L. J. C. P. 331.

(*c*) Planché *v.* Colburn (1831), 8 Bing. 14; 5 C. & P. 58.

(*d*) [1895] 2 Q. B. 418; 64 L. J. Q. B. 552.

done is of such a nature (*e.g.*, buildings on the employer's own land) that it cannot be rejected, there is no implied promise to pay for it (*e*).

"Extras." In building contracts there is often a *deviation* from the original plan by consent of the parties. The rule as to the workmen's payment for the extras so entailed is that *the original contract is to be followed so far as it can be traced;* but if it has been *totally abandoned*, then the workman may charge for his work according to its value, as if the original contract had never been made (*f*). If, however, the extras have been done by the plaintiff without any authority from the defendant, the latter is not bound to pay for them (*g*); and where by the terms of the contract extras are to be ordered in writing, the defendant is liable only for such as are so ordered (*h*). Even where the employer has assented to the deviation, he will not be liable for extras unless he must necessarily have known that the effect would be to increase the expense (*i*).

Licences.

[71] **WOOD** *v.* **LEADBITTER.** (1845)

[13 M. & W. 838; 14 L. J. Ex. 161.]

Mr. Wood usually made a point of seeing the Leger. But, while he was in the Grand Stand enclosure at the Doncaster races in 1843, with a four days' ticket, for which he had paid a guinea, in his pocket, an official came up to him, and "in consequence of some alleged malpractices of his on a former occasion connected with the

(*e*) Ellis *v.* Hamlen (1810), 3 Taunt. 52; 12 R. R. 595; Burn *v.* Miller (1813), 4 Taunt. 745; 14 R. R. 655; Munro *v.* Butt (1858), 8 E. & B. 738; 4 Jur. N. S. 1231; and Sumpter *v.* Hedges, *supra*.

(*f*) Pepper *v.* Burland (1792), Peake, 139; Robson *v.* Godfrey (1816), Holt, N. P. C. 236; 1 Stark. 275.

(*g*) Dobson *v.* Hudson (1857), 1 C. B. N. S. 652; 26 L. J. C. P. 153.

(*h*) Russell *v.* Dabandeira (1862), 13 C. B. N. S. 149; 32 L. J. C. P. 68; and see Tharsis Sulphur Co. *v.* McElroy (1878), 3 App. Cas. 1040.

(*i*) Lovelock *v.* King (1831), 1 Moo. & Rob. 60; 42 R. R. 764.

turf" requested him to leave, adding that, if he did not, it would be his duty to turn him out. Mr. Wood declined to go, and so Leadbitter, by order of Lord Eglintoun, the steward of the races, took him by the shoulders and dragged him out.

For this assault, as he called it, Mr. Wood now brought an action, maintaining that he was on the Grand Stand by the licence of Lord Eglintoun, inasmuch as that nobleman had sold him a ticket, and that such licence was irrevocable. It was held, however, that such a licence was *not* irrevocable, and that Lord Eglintoun had a perfect right, without assigning any reason, to order the plaintiff to quit the enclosure, and, if necessary, to have him forcibly removed.

Licence confers no interest in land.

Licence, how revoked.

Kerrison *v.* Smith.

The leading case goes no further than to establish that a *mere licence* (even though under seal) is revocable; the reason being that such a licence confers no interest in land, but *only renders lawful what would without it be a trespass*. Such a licence may be revoked, not merely by express words, but by any act of the licensor which shows his unwillingness or inability to continue it. *Locking a gate*, for instance, or *selling a field*, would operate as a revocation. The right of a licensor to revoke a licence granted by him may co-exist with the right of a licensee to maintain an action against the licensor for breach of contract committed by him in revoking the licence. This was recently decided in the case of Kerrison *v.* Smith (*k*); the plaintiff and defendant agreed orally that the defendant should let his wall to the plaintiff, for bill-posting, at £2 10*s.* a year, the plaintiff to erect a hoarding, on which the bills were to be posted. The plaintiff erected the hoarding, posted bills, and made several payments. The defendant then gave notice to the plaintiff that the hoarding must be removed, and nearly a month later the defendant took it down. It was held that an action to recover damages for breach of contract was maintainable.

Licence, when irrevocable.

But if the licence is more than a mere licence, if it comprises or is connected with a grant, then the person who has given it cannot revoke it so as to derogate from his own grant. Thus, if a person

(*k*) [1897] 2 Q. B. 445; 66 L. J. Q. B. 762. And see Wilson *v.* Tavener, [1901] 1 Ch. 578; 70 L. J. Ch. 263. See also *ante*, p. 110.

sells goods on his own land, and gives the vendee a licence to come and take them, he cannot revoke the licence; and the vendee would be justified in breaking down the gates and entering to take the goods (*l*). But a licence connected with an invalid grant is revocable (*m*). In the case of Winter *v.* Brockwell (*n*), it was held that a parol licence given to a neighbour to erect a sky-light *on the neighbour's own land* could not be revoked after it had been executed at the neighbour's expense. But a parol licence to make a drain *on the licensor's land* may be withdrawn at pleasure, though the licensee may have spent quite a fortune over it (*o*).

Tenant or licensee?

Difficulties sometimes arise in practice as to whether an instrument creates a tenant or merely a licensee (*p*). The test appears to be whether it was the intention of the parties that the person let into possession should have the *exclusive* possession or not. If it is clear that that was *not* the intention of the parties, the instrument is not a demise or lease, although it contains the usual words of demise (*q*). As to when a licence is *exclusive*, reference should be made to Sutherland *v.* Heathcote (*r*), where the distinction between a mere licence and a *profit à prendre* was discussed. This distinction is also pointed out in Wickham *v.* Hawker (*s*), which is a leading case on rights of sporting. The recent case of Lowe *v.* Adams, [1901] 2 Ch. 598; 70 L. J. Ch. 783, should be referred to on this subject.

May licensee sue third party?

Though a licensee has no title as against his licensor, it is not so clear that he may not sue a third person who interrupts him in the enjoyment of his licence. In Nuttall *v.* Bracewell (*t*), a mill-owner, who had for some time enjoyed the benefit of the flow of water through a goit from a natural stream, was held entitled to recover damages against a riparian owner for intercepting the water of the stream, and Bramwell, B., put his right to succeed on the plain ground that a riparian landowner can grant to a non-riparian landowner the flow of water from the stream to his premises for the use of the premises, and the grantee may sue for a disturbance of his enjoyment by a higher riparian owner. Some of the judges, however, were inclined to consider that the plaintiff was a riparian

(*l*) Wood *v.* Manley (1839), 11 A. & E. 34; 3 P. & D. 5.

(*m*) Roffey *v.* Henderson (1851), 17 Q. B. 574; 21 L. J. Q. B. 49.

(*n*) (1807), 8 East, 308; 9 R. R. 454.

(*o*) Hewlins *v.* Shippam (1826), 5 B. & C. 221; 7 D. & R. 783.

(*p*) See *ante*, p. 110.

(*q*) Hancock *v.* Austin (1863), 14 C. B. N. S. 634; 32 L. J. C. P. 252; and see Stanley *v.* Riky (1893), 31 L. R. Ir. 196; and Hastings (Lord) *v.* N. E. Ry. Co., [1898] 2 Ch. 674; 67 L. J. Ch. 590.

(*r*) [1892] 1 Ch. 475; 61 L. J. Ch. 248.

(*s*) (1840), 7 M. & W. 78; 10 L. J. Ex. 153.

(*t*) (1866) L. R. 2 Ex. 1; 36 L. J. Ex. 1.

proprietor in respect of the goit, and on that ground decided in his favour. Speaking of the previous case of Hill *v.* Tupper (*u*) (where the Basingstoke Canal Company had given the plaintiff the exclusive right of putting pleasure boats on the canal, and yet it was held that their having done so gave him no right of action against a publican who also began putting boats on the canal), Bramwell, B., said, "But it may be said, how is Hill *v.* Tupper distinguishable? One mode of enjoying land covered with water is to row boats on it, and the owner has an exclusive right. I think it easy to point out the distinction. It was competent for the grantors in that case to grant to the plaintiff a right of rowing boats on the canal; and had anyone interfered with that right, the grantee might have maintained an action against him. But the plaintiff there did not sue for any such cause of action. He sued, not because his rowing was interfered with, but because the defendant used a boat on the water."

Bailments.

COGGS *v.* BERNARD. (1704) [72]

[2 Ld. Raym. 909; Salk. 26.]

Coggs required several hogsheads of brandy to be moved from one London cellar to another. Instead of employing a regular porter to do the job, he accepted the gratuitous services of his friend Bernard, who undertook to effect the removal safely and securely. But the amateur did his work so clumsily that one of the casks was staved, and much of the liquor was lost. Coggs was not pleased; and, as he successfully maintained an action against Bernard for damages, probably that gentleman never again volunteered rash acts of friendship.

(*u*) (1863), 2 H. & C. 121; 8 L. T. 792.

[73] WILSON *v.* BRETT. (1843)

[11 M. & W. 113; 12 L. J. Ex. 264.]

A person who rides a horse gratuitously at the owner's request for the purpose of showing him for sale is bound, in so doing, to use such skill as he actually possesses. "The defendant," said Parke, B., "was shown to be a person conversant with horses, and was therefore bound to use such skill as a person conversant with horses might reasonably be expected to use: if he did not, he was guilty of negligence."

Definition.

Coggs *v.* Bernard is the great case on bailments. A bailment is a delivery of a thing in trust for some special purpose, the person who delivers it being called the bail*or*, and the person to whom it is delivered the bail*ee*.

Lord Holt's division.

Lord Holt divides bailments into six kinds:—*Depositum*, *mandatum*, *commodatum*, *vadium*, *locatio rei* and *locatio operis faciendi*.

Another division is into two broad classes (*x*), viz.:—

(a) Gratuitous bailments.

(b) Bailments for reward.

Dr. Story's division.

But Dr. Story's classification is perhaps the best, viz.:—

1. For the *benefit* of the *bailor*, alone;
2. For the *benefit* of the *bailee*, alone;
3. For the *mutual benefit* of bailor and bailee.

1. Under the first head come *depositum* and *mandatum*.

Depositum.

Depositum—the delivery of goods *to be taken care of* for the bailor without the bailee receiving anything for his trouble; *e.g.*, going away from home to the sea-side, I ask my friend Brown to take care of my plate. In the case of Ultzen *v.* Nicols (*y*), the plaintiff went into the defendant's restaurant for the purpose of dining; and his overcoat was received by the waiter at a table and, without any directions, hung up on a peg in the room. When the plaintiff rose to leave, his overcoat was gone. It was held that the jury were, on these facts, justified in finding that there was a bailment and such negligence as rendered the defendant liable. The depositary (unless he has spontaneously offered to take care of the

The missing overcoat.

(*x*) See Beal on Bailments, p. 50.
(*y*) [1894] 1 Q. B. 92; 63 L. J. Q. B. 289.

goods) is responsible only for *gross* negligence. But, having been grossly negligent, he cannot defend himself by showing that he *has lost his own things with the bailor's* (*z*).

Vigilance of bailor.

The bailor must exercise a certain amount of *vigilance in the selection of his bailee*. If I were to entrust my watch to an idiot, or a little girl, to take care of, no amount of negligence on their part would give me a right of action against them. I must bear the consequence of my folly, and be more sensible next time. So, in Howard *v.* Harris (*a*), where a manuscript play was sent unsolicited to a theatrical manager, and lost by him, it was held that the recipient bailee was only liable for wilful negligence, and not for mere carelessness.

As a rule, the depositary *may not make use of* the thing deposited. But, if no harm would come thereby, he may; and if I "deposit" my horse with a man, he not only may, but *ought* to give it proper exercise.

The depositary must give up the thing deposited to the owner, even though a stranger, on demand (*b*).

Statute of Limitations.

When money is deposited with a person for safe custody, *and not by way of loan*, no right of action arises until demand is made for it by the depositor, and therefore the Statute of Limitations does not begin to run until such demand (*c*).

Mandatum.

Mandatum—the delivery of goods *to be done something with* for the bailor without the bailee receiving anything for his trouble; *e.g.*, I ask my friend Jones to post a letter for me.

As in *depositum* (and *mandatum* is only a kind of superior *depositum*) the bailee is liable for gross negligence only. The contract between Coggs and Bernard was one of *mandatum*, though it is to be observed that Bernard laid additional responsibility on his shoulders by undertaking to effect the removal "safely." In the well-known case of Dartnall *v.* Howard (*d*), the action was brought for negligently laying out money on bad securities. The defendants had acted in the matter gratuitously, and on this

(*z*) Doorman *v.* Jenkins (1834), 2 Ad. & E. 258; 4 N. & M. 170; and see Giblin *v.* McMullen (1868), L. R. 2 P. C. 317; 38 L. J. P. C. 25.

(*a*) (1884), 1 C. & E. 253.

(*b*) Buxton *v.* Baughan (1834), 6 C. & P. 674; 40 R. R. 842; Biddle *v.* Bond (1865), 6 B. & S. 225; 34 L. J. Q. B. 137; Ross *v.* Edwards (1895), 72 L. T. 100; 11 R. 574; and see Henderson *v.* Williams, [1895] 1 Q. B. 521; 64 L. J. Q. B. 308.

(*c*) *In re* Tidd, Tidd *v.* Overell, [1893] 3 Ch. 154; 62 L. J. Ch. 915.

(*d*) (1825), 4 B. & C. 345; 6 D. & R. 438; and see Wilkinson *v.* Coverdale (1793), 1 Esp. 75; 53 R. R. 256; and Robinson *v.* Ward (1825), R. & M. 274; 2 C. & P. 59.

ground it was held that the plaintiffs were not entitled to recover damages from them.

Skilled mandataries.

The rule, however, that a mandatary is responsible for gross negligence only, is to some extent qualified by the maxim *spondes peritiam artis*. It is stated in the case that gross negligence was not imputed to Brett. Literally, this is true. But what is ordinary negligence in one man is gross negligence in another; and the omission by a person endowed with skill to make use of that skill is really nothing short of gross negligence. In this view, Wilson *v.* Brett is no exception to the rule that a gratuitous bailee is responsible only for gross negligence; constructively, Brett *was* guilty of gross negligence. So, too, a doctor who attended a poor person out of charity would be liable for merely ordinary negligence in the treatment of his patient; constructively, it would not be merely ordinary negligence, because his position implies skill (*e*).

Consideration in *mandatum*.

An action cannot be brought on a *promise to enter on* a gratuitous bailment, there being no consideration for it. But if the promisor *actually sets about* the business, he then becomes responsible for gross negligence, the trust reposed in him by the bailor being a sufficient consideration (*f*).

2. Under this head (for the benefit of the bailee alone) comes

Commodatum.

Mutuum.

Commodatum—the *lending* of a thing to be returned just as it is; *e.g.*, I lend Jones my umbrella to go through the rain with; I do not expect him to return me *another* umbrella, but *the same one*. If I expected a borrower to return me, not the identical things, but similar, *e.g.*, if I were to lend him half a dozen postage stamps, or a five pound note, it would not be *commodatum*, but *mutuum*.

As the bailee is the only person who gets any good out of *commodatum* (except perhaps a lawyer now and then), he is responsible even for *slight* negligence; the more so as by the fact of borrowing he may be taken to have represented himself to the lender as a fit and proper person to be entrusted with the article.

Duties of borrower.

The commodatary must strictly pursue the terms of the loan. If I borrow a horse or a book to ride or to read myself, I have no business to allow somebody else to ride or to read it (*g*). If the horse is lent for the highway, I must not take it along dangerous bridle-paths. The bailee must restore the chattel, when the time has expired, just as it was, reasonable wear and tear excepted. He is not responsible, however, if the article perishes by inevitable

(*e*) Shiells *v.* Blackburne (1789), 1 H. Bl. 158; 2 R. R. 750.

(*f*) Elsee *v.* Gatward (1793), 5 T. R. 143.

(*g*) See, however, a distinction taken by North, C. J., in Bringloe *v.* Morrice (1676), 1 Mod. 210, between lending a horse to a person for a *specified time* and lending it for a *particular journey*.

accident, or by its being stolen from him without any fault of his. In *mutuum*, on the other hand, the right of property and risk of loss are immediately on the bailment transferred to the borrower, so that if he is robbed before he gets home, he must still pay the equivalent to the lender. As a general rule, a bailee cannot set up *jus tertii* against his bailor (*h*).

Duties of lender.

The bailor must disclose defects of which he is aware; as, for instance, that the gun which he lends his friend Brown is more likely than not to burst and blow his hand off (*i*). The ground of this obligation is that, *when a person lends, he ought to confer a benefit, and not to do a mischief* (*k*). The lender, however, will not be responsible for defects of which he is ignorant (*l*). "Knowledge of the defect," said A. L. Smith, L. J., in a recent case (*m*), "is an essential to the right of the borrower to recover, when he has been injured by reason of the article not being fit for the purpose for which it was lent. It is said that is not the law, but that an action is maintainable if the bailee can show gross negligence on the part of the bailor in not finding out the defects. I will go this far—that if gross negligence is shown on the part of the bailor in not communicating to the bailee that which he knew of the insufficiency of the article bailed, an action is maintainable; but the law does not go further than that."

The commodatary has no lien on the thing lent for antecedent debts due to him; nor, of course, can he keep it till the bailor pays the necessary expenses he has been put to in the keeping of it.

3. Under the last head (for the mutual benefit of bailor and bailee) come *vadium*, *locatio rei* and *locatio operis*.

Vadium.

(1.) *Vadium* (otherwise known as *pignoris acceptum*)—the contract of pawn.

The benefit being mutual, the degree of vigilance required of the bailee is "ordinary." If, in spite of due diligence, the chattel is lost while in the pawnee's keeping, he may still sue the pawnor for the amount of his debt.

Pawning at common law.

The effect of the contract of pawn is not (like that of a mortgage of personalty) to pass the property in the chattel to the bailee; nor, on the other hand, is it (like that of a lien) merely to give him a hostage, but it gives him such a special property in the thing

(*h*) *Ex parte* Davies (1881), 19 Ch. D. 86; 45 L. T. 632. See also Rogers *v.* Lambert, [1891] 1 Q. B. 318; 60 L. J. Q. B. 187.

(*i*) Blakemore *v.* Brist. & Ex. Ry. Co. (1858), 8 E. & B. 1035; 4 Jur. N. S. 657.

(*k*) Adjuvari quippe nos, non decipi, beneficio oportet. Dig. lib. xiii. tit. vi. 17.

(*l*) MacCarthy *v.* Young (1861), 6 H. & N. 329; 3 L. T. 785.

(*m*) Coughlin *v.* Gillison, [1899] 1 Q. B. 145; 68 L. J. Q. B. 147.

pawned as enables him, if the pawnee makes default, to sell it and pay himself (*n*); the surplus being, of course, handed back to the pawnor. And a pledgee may redeliver the goods to the pledgor for a limited purpose, without thereby losing his rights under the contract of pledge (*o*).

As a rule, the pawnee may not make use of the thing bailed to him. If, however, it is an article which cannot be the worse for the use—jewellery, for instance—he may; but in such a case he would be responsible for the loss, no matter how it happened. Moreover, if the pawn be of such a nature that the pawnee is put to expense to keep it, *e.g.*, if it be a horse or a cow, the pawnee may make use of it,—riding the horse or milking the cow—as a recompense for the cost of maintenance.

The Pawnbrokers Act.

Such are some of the common law rules as to *vadium;* and they apply now to cases where the sum lent exceeds £10. But when the sum lent by way of *vadium* is less than £10, the Pawnbrokers Act, 1872 (*p*), applies. That Act provides that every pledge must be redeemed within twelve months and seven days. If it is not redeemed within that time, what becomes of it depends on whether the sum lent was more or less than 10*s*. If it was 10*s*. or less, the article then becomes the pawnbroker's absolute property. If it was more, the pawnbroker may sell the thing pledged, but must hand over the surplus, after satisfaction of his debt and interest, to the pawnor. If the sale of the pledge realizes less than the amount of the debt, a pawnbroker still possesses his common law right to recover the balance (*q*). *Till actual sale*, however, a pledge pawned for above 10*s*. is redeemable though the year and seven days have gone by (*r*). The pawnbroker is liable for loss by fire, and should protect himself by insuring (*s*). He is liable, too, for any injury done to the thing pawned by his "default and neglect, or wilful misbehaviour," and a court of summary jurisdiction may order compensation for such depreciation (*t*). Sect. 25 says that "the holder for the time being of a pawn-ticket shall be presumed to be the person entitled to redeem the pledge," but it has been held that the owner of an article that has been stolen and pawned may (notwithstanding the section) recover it, or its value, from the pawn-

(*n*) Tucker *v.* Wilson (1714), 1 P. Wms. 260; but see Clark *v.* Gilbert (1835), 2 Bing. N. C. 356; 2 Scott, 520; *Ex parte* Hubbard (1886), 17 Q. B. D. 690; 55 L. J. Q. B. 490.

(*o*) See North Western Bank *v.* Poynter, [1895] A. C. 56; 64 L. J. P. C. 27.

(*p*) 35 & 36 Vict. c. 93.

(*q*) Jones *v.* Marshall (1890), 24 Q. B. D. 269; 59 L. J. Q. B. 123.

(*r*) Sect. 18.

(*s*) Sect. 27.

(*t*) Sect. 28.

broker (*u*). So, too, where a person entrusted with goods for the purpose of sale only, pledges them with a pawnbroker, he is not a mercantile agent "acting in the ordinary course of business of a mercantile agent" within the meaning of sect. 2 of the Factors Act, 1889, and the pawnbroker is not protected by that section from an action by the owner to recover the value of the goods (*x*). And a person wrongfully pawning the goods of another person, who subsequently recovers the goods, is liable to proceedings under sect. 33 of the Act, at the instance of the pawnbroker, notwithstanding that he has previously been convicted of larceny of the goods (*y*).

(2.) *Locatio rei*—the every-day contract of the hiring of goods. *Locatio rei.*

This being a mutual benefit bailment, the degree of negligence for which the hirer is answerable is "ordinary." The hirer of a horse once physicked it himself, instead of calling in a veterinary surgeon. He prescribed "a stimulating dose of opium and ginger," and of course the animal "soon after taking it died in great agony." On the ground that he had not exercised "that degree of care which might be expected from a prudent man towards his own horse," the hirer was held liable (*z*).

The responsibility of the hirer to take reasonable care of the goods hired extends to all injuries caused to them by the negligence of his servant to whom he may have intrusted the care of them. Thus, in the case of the Coupé Company *v.* Maddick (*a*), the defendant hired a carriage and horse from the plaintiffs; his coachman, in place of taking them, as was his duty, to the stable, drove for his own purposes in another direction; and while so engaged, the carriage and horse were injured, owing to his negligent driving. It was held, that there had been a breach of the defendant's contract as bailee, for which he was liable.

If the hirer does something plainly inconsistent with the terms of the bailment, *e.g.*, if he sells the article hired, the bailment is at an end (*b*).

There is an implied warranty by the person from whom goods are Duty of person

(*u*) Singer Manufacturing Co. *v.* Clark (1879), 5 Ex. D. 37; 49 L. J. Ex. 224. And see Burrows *v.* Barnes (1900), 82 L. T. 721.

(*x*) Hastings *v.* Pearson, [1893] 1 Q. B. 62; 62 L. J. Q. B. 75.

(*y*) Pickford *v.* Corsi, [1901] 2 K. B. 212; 70 L. J. K. B. 710.

(*z*) Deane *v.* Keate (1811), 3 Camp. 4; 13 R. R. 735.

(*a*) [1891] 2 Q. B. 413; 60 L. J. Q. B. 676. And as to the liability of a gratuitous bailee for his servant's wrongful acts, see Giblin *v.* McMullen (1868), L. R. 2 P. C. 317; 38 L. J. P. C. 25; and Neuwith *v.* Over-Darwen Industrial Society (1894), 10 R. 588; 63 L. J. Q. B. 290.

(*b*) Fenn *v.* Bittlestone (1851), 7 Ex. 159; 21 L. J. Ex. 41; and see Nyberg *v.* Handelaar, [1892] 2 Q. B. 202; 61 L. J. Q. B. 709.

from whom goods are hired.

hired for a particular purpose that they are reasonably fit for the purpose for which they are supplied. There has, however, been some little difference of opinion as to the extent of this obligation. In the case of Hyman *v.* Nye (*c*), the late Master of the Rolls (then Lindley, J.) held that the article must be as fit for the purpose for which it is hired as care and skill can make it; while Mathew, J., in the same case, put it that the article must be reasonably fit for the purpose for which it was supplied; and this latter view was recently adopted by Wright, J., in the case of Vogan *v.* Oulton (*d*). "I think," said that learned judge, "the article must be reasonably fit and free from all unreasonable defects, whether they are latent or otherwise, as was decided in Randall *v.* Newson" (*e*).

Hire and purchase agreements.

It may be mentioned here that what is called the *hire system*, under which goods are delivered to a person to be paid for by instalments, does not vest the property in the goods in the purchaser till all the instalments are paid (*f*). Whether a *hire and purchase* agreement does or does not fall within the provisions of sect. 9 of the Factors Act, 1889 (52 & 53 Vict. c. 45), depends upon its terms. On this point the decision of the House of Lords, in Helby *v.* Matthews (*g*), should be referred to, and the terms of the agreement in that case should be compared with those in the case of Lee *v.* Butler (*h*). The chief distinction between these cases is, that in the latter the so-called "hirer" was bound by the terms of the agreement to pay for and purchase the furniture, while in the former he was under no such liability.

Locatio operis faciendi.

(3.) *Locatio operis faciendi.* When the bailee is to bestow labour on or about the thing bailed, and to be paid for such labour.

Bailees of this class are, for instance, wharfingers, agisters, carriers, &c.

Generally speaking, the rule as to diligence is the same as in *vadium* and *locatio rei* (*i*). But the bailee must have his wits about

(*c*) (1881), 6 Q. B. D. 685; 44 L. T. 919.

(*d*) (1898), 79 L. T. 384.

(*e*) (1877), 2 Q. B. D. 102; 45 L. J. Q. B. 364.

(*f*) *Ex parte* Crawcour (1878), 9 Ch. Div. 420; 47 L. J. Bk. 94; and see Beckett *v.* Tower Assets Co., [1891] 1 Q. B. 638; 60 L. J. Q. B. 493; Madell *v.* Thomas, [1891] 1 Q. B. 230; 60 L. J. Q. B. 227.

(*g*) [1895] A. C. 471; 64 L. J. Ch. 465; reversing the decision of the Court of Appeal, [1894] 2 Q. B. 577; 63 L. J. Q. B. 577. The decision in Payne *v.* Wilson, [1895] 1 Q. B. 653; 64 L. J. Q. B. 328; was, by consent, reversed in the Court of Appeal; see [1895] 2 Q. B. 537; 65 L. J. Q. B. 150. And see Shenstone *v.* Hilton, [1894] 2 Q. B. 452; 63 L. J. Q. B. 584; and Hull Ropes Co. *v.* Adams (1896), 65 L. J. Q. B. 114; 73 L. T. 446.

(*h*) [1893] 2 Q. B. 318; 62 L. J. Q. B. 591.

(*i*) See Searle *v.* Laverick (1874), L. R. 9 Q. B. 122; 43 L. J. Q. B. 43.

him, and take proper precautions against casualties that may possibly happen (*k*). And when the bailee is a person exercising a public employment, *e.g.*, a common carrier or an innkeeper, he is required to exert much greater circumspection. In fact, a common carrier is an insurer, being responsible for loss by any cause except the act of God, or the king's enemies, or some inherent defect in the thing carried (*l*). Moreover, if a bailee elects to deal with the property entrusted to him in a way not authorized by the bailor (*e.g.*, if, having contracted to warehouse goods at one place he warehouses them at another, where they are accidentally destroyed), he takes upon himself the risks of so doing (*m*).

Agister.

An agister (*e.g.*, a person who takes in horses or cattle to feed in his pasture) is not an insurer, but must use reasonable care (*n*). For instance, if he leaves the gates of his field open, or his fences are out of order, he will be liable for loss happening thereby (*o*). So, if he has not taken proper precautions to prevent mischief, he will be liable for an injury inflicted by another animal (*p*). In the absence of agreement, an agister has no lien (*q*).

In Clarke *v.* Earnshaw (*r*) the plaintiff had delivered a timepiece to the defendant, a watchmaker, to be repaired. The watchmaker had locked it up in a drawer in his shop, from which it was stolen by a youth who used to sleep in the shop for the express purpose of protecting the property. The defendant was held liable because it appeared that he had put other watches in a more secure place.

Trover.

As to the right to maintain trover in these bailments, it may be remarked that in *vadium* and *locatio rei* it is only the bailee who can do so; for in either of those contracts he can exclude the bailor from the possession. But in the other kinds of bailment either bailor or bailee may sue, but the recovery of damages by either would generally deprive the other of his right of action.

In the case of Claridge *v.* South Staffordshire Tramway Co. (*s*),

(*k*) Leck *v.* Maestaer (1807), 1 Camp. 138; 10 R. R. 660; and see Thomas *v.* Day (1803), 4 Esp. 262; 6 R. R. 857; The Moorcock (1889), 14 P. D. 64; 58 L. J. P. 73; and The Calliope, [1901] A. C. 11; 60 L. J. P. 28. See also the important decision in Brabant *v.* King, [1895] A. C. 632; 64 L. J. P. C. 161.

(*l*) See *post*, p. 304.

(*m*) Lilley *v.* Doubleday (1881), 7 Q. B. D. 510; 51 L. J. Q. B. 310.

(*n*) Broadwater *v.* Bolt (1817), Holt, 547; 17 R. R. 677; Seton *v.* Lafone (1887), 19 Q. B. D. 68; 56 L. J. Q. B. 164.

(*o*) Groucott *v.* Williams (1863), 32 L. J. Q. B. 237; 8 L. T. 458.

(*p*) Smith *v.* Cook (1875), 1 Q. B. D. 79; 45 L. J. Q. B. 122.

(*q*) Jackson *v.* Cummins (1839), 5 M. & W. 342; and Richards *v.* Symons (1845), 8 Q. B. 90; 15 L. J. Q. B. 35.

(*r*) (1818), Gow. 30; 21 R. R. 790.

(*s*) [1892] 1 Q. B. 422; 61 L. J. Q. B. 503.

the owner of a horse delivered it to the plaintiff, an auctioneer, for sale, with liberty to use it until sold. Whilst the horse was being driven by the plaintiff's servant in the plaintiff's carriage, it was frightened by a steam tramcar of the defendants', and fell, with the result that both horse and carriage were injured. The accident was wholly due to the defendants' negligence. It was held by the Divisional Court (Hawkins and Wills, JJ.) that the plaintiff could only recover damages for the injury to his carriage, and not for the injury to the horse, because, in the absence of negligence, he was under no liability to his bailor for any depreciation in the horse. This case, however, was overruled by the Court of Appeal in the recent case of The Winkfield (*t*), where it was held that, in an action against a stranger for loss of goods caused by his negligence, the bailee in possession of the goods can recover their value, although he would have had a good answer to an action by the bailor for damages for the loss of the goods.

The Winkfield.

Vituperative epithets.

The terms "gross negligence," "ordinary negligence," &c. have been freely used in speaking of these bailments. Many eminent lawyers, however, maintain that there are really no degrees of negligence, and that, as Rolfe, B., said in Wilson *v.* Brett, negligence and *gross* negligence are "the same thing, with the addition of a vituperative epithet" (*u*).

Liability of Innkeepers.

[74]

CALYE'S CASE. (1584)

[8 Coke, 33; Res. 5.]

A traveller arriving at an inn dismounted from his horse, and told the landlord to send it out to pasture. The landlord, accordingly, did so; but, when its master wished to resume his journey, it was nowhere to be found. The owner now tried to make out that the landlord was

(*t*) [1902] P. 42; 71 L. J. P. 21.

(*u*) But see Beal on Bailments, pp. 12—26, for a collection of judicial definitions and text-book writers' definitions of the various degrees of care and neglect.

responsible. But it was held that he was *not*, for the horse had been sent into the field at the express desire of the guest.

Common law liability.

The liability of innkeepers, like that of common carriers, probably had its origin in their readiness to collude with highwaymen, often their best customers. That liability was at common law very great. They were not indeed responsible for losses arising by the act of God or the king's enemies, but they were responsible for all other losses, unless they could make out clearly that it was the guest's own fault. In 1863, however, the liability of innkeepers was greatly restricted, and by the Act then passed (*x*) an innkeeper is never bound to pay more than £30 for loss of or injury to property brought to his inn, except in the following cases:—

Act of 1863.

Horse or carriage.

1. Where the article which has been lost or injured is "a horse or other live animal, or any gear appertaining thereto, or any carriage."

"Wilful act, default or neglect."

2. Where the property has been stolen, lost, or injured through the wilful act, default, or neglect of the innkeeper, or of one of his servants.

Deposit.

3. Where the property has been expressly deposited with him for safe custody. The innkeeper, however, may require, as a condition of his liability, that the guest shall fasten and seal up his property in a box or other receptacle. And it has recently been held, in an Irish case (*y*), that the guest, when making the deposit, must inform the innkeeper, in a reasonable and intelligible manner, that the deposit is for the safe custody of the article.

Posting up sect. 1.

But the innkeeper is not entitled to the benefit of this Act unless he puts up a copy of section 1, printed in plain type, in a conspicuous part of his entrance-hall, and he had better take care not to omit material parts of the section, or play other pranks with the Act, for the Courts have shown clearly that they will not allow innkeepers to trifle with it. The landlord of the "Old Ship" at Brighton posted up what purported to be a copy of section 1. But through some mistake the word "act" was left out, so that the sentence ran "wilful default or neglect" instead of "wilful act, default, or neglect." A gentleman staying at the hotel had his watch and other things stolen during the night, and went to law with the landlord to recover their value. The defendant paid £30 into Court, but said that the Act protected him against any further claim. But it was held that, as he had not posted up a

(*x*) 26 & 27 Vict. c. 41.

(*y*) O'Connor *v.* Grand International Hotel Co. (1898), 2 Ir. R. 92.

correct copy of section 1, he was not entitled to the benefit of the Act (*z*). "We have an omission," said Cockburn, C. J., "which is far beyond a mere clerical error. It is an omission of a substantial part of the notice. When we have an omission of a material and really substantial part of the notice required by statute, I cannot think it a copy sufficient to satisfy the requirements of the Act."

It may be mentioned that it has been held at *nisi prius* (in a case from Ryde, where the real question appears to have been whether the chambermaid's allowing a stranger to go upstairs to wash his hands without accompanying him was an act of negligence) that *the word "wilful" in the first section applies only to the following word "act,"* and not to the next following words, "default or neglect" (*a*).

Supposing the innkeeper not to have complied with the conditions of this Act, his liability remains the same as at common law, almost his only defence being to show that his guest has been negligent. The question of the guest's negligence must in all cases depend upon the surrounding circumstances (*b*). If he has not used the ordinary care which may reasonably be expected from a prudent man, he cannot make the innkeeper responsible for the loss of his goods. In Armistead *v.* Wilde (*c*), for instance, there had been an ostentatious display of bank notes, with a good deal of bragging, and the guest had let everybody see that he put the notes in an ill-secured box. "These facts," said Lord Campbell, C. J., "might or might not amount to negligence, but they were evidence of it; and it was a fair question for the jury." The omission by the guest to leave valuable articles with the innkeeper, or to fasten his bedroom door at night, is not necessarily negligence (*d*). It may or may not be, according to the circumstances. What would be prudent in a small hotel in a small town might be the extreme of imprudence at a large hotel in a city like Bristol, where probably 300 bedrooms are occupied by people of all sorts (*e*). See also the cases of Cashill *v.* Wright (watch and money stolen from bedroom) (1856), 6 E. & B. 891; 2 Jur. N. S. 1072; and Burgess *v.* Clements (1815) (jewellery stolen from private room left unlocked at an Oxford inn), 4 M. & S. 306; 1 Stark. 251.

(*z*) Spice *v.* Bacon (1877), 2 Ex. Div. 463; 46 L. J. Q. B. 713.

(*a*) Squire *v.* Wheeler (1867), 16 L. T. 93.

(*b*) Per Lopes, J., in Herbert *v.* Markwell (1882), 45 L. T. 649; 46 J. P. 358.

(*c*) (1851), 17 Q. B. 261; 20 L. J. Q. B. 524.

(*d*) Morgan *v.* Ravey (1861), 6 H. & N. 265; 30 L. J. Ex. 131.

(*e*) Per Montagu Smith, J., in Oppenheim *v.* White Lion Co. (1871), L. R. 6 C. P. 515; 40 L. J. C. P. 93.

If a guest refuses to pay the reckoning, the landlord has a lien on the luggage and belongings which he brought to the inn, whether they are the man's own or not (*f*). Thus, in Robins *v.* Gray (*g*), a commercial traveller who travelled for the plaintiffs went in the course of their business to stay as a guest at the defendant's inn. While he was there the plaintiffs sent to him certain parcels of goods for sale in the district, which goods the defendant at the time they were received into the inn knew to be the goods of the plaintiffs, and not of the traveller. Subsequently the traveller failed to pay for his board and lodging in the inn. The Court held that the defendant had a lien upon the goods in respect of the debt. If the bill is not settled in six weeks, the landlord may sell the goods, handing back any surplus there may be (*h*). He is required to advertise the sale a month beforehand in a London and local newspaper. In the case of Angus *v.* McLachlan (*i*), it was held that an innkeeper who accepts security from his guest for the payment of his charges does not thereby waive his lien. "As I understand the law," said Kay, J., "it is not the mere taking of a security which destroys the lien, but there must be something in the facts of the case, or in the nature of the security taken, which is inconsistent with the existence of the lien, and which is destructive of it. In this case the lien is within the provisions of 41 & 42 Vict. c. 38, by virtue of which the innkeeper not only has a passive lien, but also the active right to sell the goods upon giving the notice required by the Act. Is it probable that he would have given up this active lien? . . . . There is nothing in the case inconsistent with the continuance of the lien which the plaintiff undoubtedly had before the security was given." It was also held in this case that an innkeeper keeping his guest's goods under his lien need not use more care about their custody than he uses as to his own things of a similar kind. An innkeeper may not detain the person of his guest, nor what he may be wearing or carrying, for non-payment of his bill (*k*).

Innkeeper's lien.

It was said in Calye's case that, if the landlord had sent the horse into the field without his guest's authority, he would have been responsible. Such a case has actually occurred. A Bewdley inn-

Sending horse to pasture without authority.

(*f*) Threfall *v.* Bowick (1875), L. R. 10 Q. B. 210; 44 L. J. Q. B. 87; and see Broadwood *v.* Granara (1854), 10 Ex. 417; 24 L. J. Ex. 1; Gordon *v.* Silber (1890), 25 Q. B. D. 491; 59 L. J. Q. B. 507.

(*g*) [1895] 2 Q. B. 78; 64 L. J. Q. B. 591. Affirmed by the Court of Appeal, [1895] 2 Q. B. 501; 65 L. J. Q. B. 44.

(*h*) 41 & 42 Vict. c. 38.

(*i*) (1883), 23 Ch. Div. 330; 52 L. J. Ch. 587; and see Cowell *v.* Simpson (1809), 16 Ves. 275; 10 R. R. 181.

(*k*) Sunbolf *v.* Alford (1838), 3 M. & W. 248; 1 H. & H. 13.

keeper, whose coach-house was full, put a guest's gig into the adjoining street without saying a word to him on the subject. The gig was stolen, and the owner sued the innkeeper, who was held liable on the ground that he had chosen to treat the street as part of the inn (*l*).

An action for the loss of goods at an hotel must be brought against the person really carrying on the business, not against a paid manager, although the justices' licence may have been granted in his name (*m*).

Distress. A guest's goods and chattels cannot be distrained upon while on the premises of the innkeeper.

Definition of inn. An inn has been defined as "a house where the traveller is furnished with everything he has occasion for while on his way" (*n*). A coffee-house where there are beds may be such a place; but not a lodging or boarding-house: and it has been decided, in a case where a man had insisted on entering accompanied by an offensive dog, that a refreshment bar attached to an hotel, under the same roof, but with a separate entrance, is not (*o*). Any traveller (not being a thief or prostitute, or constable on duty, or having a contagious disease, or being some other essentially objectionable person) who is ready to pay for his accommodation, and conducts himself properly, can claim admission into an inn, if there is room, at any hour of the day or night; and if the landlord refuses it, an action lies against him, or he may be indicted (*p*). An innkeeper, the bedrooms in whose inn are all occupied, is not bound to receive a guest who desires to sleep the night at the inn (*q*). But the common law liability of an innkeeper to receive and lodge a guest attaches only so long as the guest is a traveller; and a person who has been received at an inn as a traveller does not necessarily continue to reside there in that character. Whether at any given time during his residence he is still a traveller is a question of fact, and one of the ingredients for determining this fact is the length of time that has elapsed since his arrival. If the guest has lost the character of traveller, the innkeeper is not bound to supply him with lodging, but is entitled, on giving reasonable notice, to require him to

(*l*) Jones *v.* Tyler (1834), 1 Ad. & E. 522; 3 N. & M. 576.

(*m*) Dixon *v.* Birch (1873), L. R. 8 Ex. 135; 42 L. J. Ex. 135.

(*n*) Thompson *v.* Lacy (1820), 3 B. & Ald. 283; 22 R. R. 385, where it was contended that the defendant's establishment was not an inn, because it was not frequented by stage coaches and waggons from the country, and had no stables.

(*o*) R. *v.* Rymer (1877), 2 Q. B. D. 136; 46 L. J. M. C. 108.

(*p*) Fell *v.* Knight (1841), 8 M. & W. 269; 5 Jur. 554; R. *v.* Ivens (1835), 7 C. & P. 213; 48 R. R. 780.

(*q*) Browne *v.* Brandt, [1902] 1 K. B. 696; 71 L. J. Q. B. 367.

leave (*r*). And it should be observed that the landlord of a fully licensed house—as distinguished from an inn—has the right to require a person who is not a traveller, even though he be neither drunk, violent, quarrelsome, nor disorderly within the meaning of sect. 18 of the Licensing Act, 1872, to leave the house, and, upon refusal, to eject him, for such right does not depend upon the provisions of that section (*s*). The mere purchase of temporary refreshment, or the putting up of his horse, makes a man a guest, so as to raise the innkeeper's responsibility (*t*). Reference on this point should be made to the recent case of Orchard *v.* Bush (*u*). The plaintiff, who had an office in Liverpool, resided outside the city and came in and out every day by train. On his way home in the evening he called at the defendant's hotel, which was between his office and the railway station, for the purpose of dining only, and he was supplied with dinner in the dining-room of the hotel, a large room structurally forming part of the hotel and reached by the same entrance as the rest of the hotel, but capable of accommodating, and wont to accommodate, a large number of persons in addition to those who were staying in the hotel. Upon these facts, the Court held that there was sufficient evidence to establish the relationship of innkeeper and guest between the defendants and the plaintiff so as to make the defendants liable to the plaintiff for the value of his overcoat lost in the hotel. But it has been held that a temporary waiter at a ball given at an inn is not a guest, and cannot recover from the landlord the value of an overcoat heartlessly stolen whilst he is discharging his important duties (*x*).

Orchard *v.* Bush.

As to the effect of a notice in a bedroom of an inn that "articles of value, if not kept under lock, should be deposited with the manager, who will give a responsible receipt for the same," reference should be made to the case of Huntly *v.* Bedford Hotel Co. (*y*), where it was held that this notice did not constitute a special bargain with a guest that the landlord would be responsible if jewels *were* kept under lock.

Notices in bedrooms.

In the case of Strauss *v.* The County Hotel Co. (*z*), the plaintiff had arrived at Carlisle and given his luggage to the hotel porter with a view to staying at the hotel, when an important telegram induced him to alter his intentions. He told the porter to lock up

Strauss's case.

(*r*) Lamond *v.* Richard, [1897] 1 Q. B. 541; 66 L. J. Q. B. 315.

(*s*) Sealey *v.* Tandy, [1902] 1 K. B. 296; 71 L. J. K. B. 41.

(*t*) Bennett *v.* Mellor (1793), 5 T. R. 274; 2 R. R. 593; York *v.* Grindstone (1705), 1 Salk. 388.

(*u*) [1898] 2 Q. B. 284; 67 L. J. Q. B. 650.

(*x*) Carter *v.* Hobbs, 12 Mich. 52.

(*y*) (1892), 56 J. P. 53.

(*z*) (1883), 12 Q. B. D. 27; 53 L. J. Q. B. 25.

the luggage, which was done; but afterwards some of the property was found to be missing. It was held that at the time of the loss of the plaintiff's goods there was no evidence of the relation of landlord and guest, and therefore that the defendants were not responsible. The liability of an innkeeper continues during the temporary absence of his guest (*a*); but if a host invites one to supper, and, the night being far spent, invites him to stay all night, if he is afterwards robbed, yet shall not the host be charged (as an innkeeper), for this guest was no traveller (*b*).

Medawar's case.

As to who is a "guest," and as to the *onus of proof* in actions against innkeepers for the loss of their guests' property, reference should be made to the important case of Medawar *v.* Grand Hotel Co., [1891] 2 Q. B. 11; 60 L. J. Q. B. 209.

"*Proper Vice.*"

[75] **BLOWER *v.* GREAT WESTERN RAILWAY CO.**
(1872)

[L. R. 7 C. P. 655; 41 L. J. C. P. 268.]

Blower had a bullock which he wanted to send by railway from Monmouth to Northampton. The beast was duly loaded to Blower's satisfaction in one of the Great Western Railway Company's trucks, but on the journey it managed to escape, and got killed on the line. Admitting that the company had not been at all negligent in the carrying of the animal, were they not liable as common carriers? No; for the disaster was due to the "*inherent vice*" of the subject of bailment.

Third exception.

The effect of this case is practically to introduce a third exception to the rule that common carriers are insurers. They are to be excused not only when the loss has been occasioned by the act of

(*a*) Day *v.* Bather (1863), 2 H. & C. 14; 32 L. J. Ex. 171.
(*b*) Bac. Abr. Inns. c. 5.

God or the king's enemies, but also if it has happened through the *inherent defect* of the thing carried.

The leading case was followed in Nugent *v.* Smith (*c*), where a horse, while being conveyed by sea from London to Aberdeen, received fatal injuries caused partly by more than ordinary bad weather and partly by the conduct of the horse itself; the important judgment of Cockburn, C. J., should be referred to. If the carrier can show that either the act of nature, or the defect of the thing itself, or both taken together, formed the sole, direct, and irresistible cause of the loss, he is discharged; and in order to show that the cause of the loss was irresistible, it is not necessary to prove that it was absolutely impossible for the carrier to prevent it, but it is sufficient to prove that by no reasonable precaution under the circumstances could it have been prevented. Nugent *v.* Smith.

The principle of these cases was recently applied in Lister *v.* Lancashire and Yorkshire Railway (*d*). The defendants contracted with the plaintiff as common carriers to carry for him an engine from his yard to a neighbouring town on the defendants' railway. The engine was on wheels, and fitted with shafts to allow of its being drawn by horses. While the defendants were drawing the engine with their horses to the railway station one of the shafts, owing to its being rotten, broke; the horses took fright and upset the engine, which was damaged. The defective condition of the shaft was not known to either the plaintiff or the defendants, and could not have been discovered by any ordinary examination. It was held by the Divisional Court (Lord Alverstone, C. J., Wills, J., and Channell, J.), that as the engine was not in fact fit to be carried in the way in which it was intended to be carried, and the damage resulted in consequence of that unfitness, the defendants were not liable. So, too, a common carrier is not responsible for the deterioration of perishable articles, or for the evaporation or leakage of liquids. But when it is the custom of a railway company to feed animals consigned to them for carriage at the expense of the consignor during delay in transit, the company incurs liability for any loss occasioned by leaving the animals unfed (*e*). Lister *v.* L. & Y. Ry. Co. Perishable articles.

But in all such cases the carrier will be liable for his negligence. A man sent a cow by train from Doncaster to Sheffield. When it got to Sheffield a porter rather unadvisedly released it, and it ran into a tunnel and was killed. The restiveness and stupidity of the cow was undoubtedly the real cause of its death, but the porter Gill's case.

(*c*) (1876), 1 C. P. D. 423; 45 L. J. C. P. 697. See also Kendall *v.* L. & S. W. Ry. Co. (1872), L. R. 7 Ex. 373; 41 L. J. Ex. 184.

(*d*) [1903] 1 K. B. 878; 72 L. J. K. B. 385.

(*e*) Curran *v.* M. G. W. Ry. Co. of Ireland (1896), 2 Ir. R. 183.

ought not to have been in such a hurry to let it out; and on this latter ground his masters were held responsible (*f*).

Bad packing.

A carrier, again, will not be responsible for injury happening through the *improper packing* of the subject of bailment; at all events, if he was not aware that it was packed improperly. Thus it has been held that a railway company cannot be charged with negligence if a greyhound escapes through the insufficiency of a chain and collar supplied by the owner and appearing to be good enough (*g*).

Dangerous goods.

A person who delivers a dangerous substance to a common carrier without giving him any information about it is responsible for all the evil consequences arising therefrom (*h*). It has been expressly provided by Act of Parliament (*i*) that a carrier is not bound to receive such things. But a carrier cannot refuse to carry a parcel merely on the ground that he is not informed of its contents (*k*).

Common carriers not general carriers.

It is to be observed that common carriers are not necessarily general carriers. To ascertain the nature and extent of a carrier's business, reference must be made to his public professions and representations (*l*).

A common carrier is bound at common law to receive and carry all goods reasonably offered to him, and for the carrying of which the person bringing the goods is ready to pay (*m*). In the absence of a special contract, he must deliver within a time that is reasonable, regard being had to all the circumstances (*n*). Provided he carry by reasonable route, he is not bound to carry by the shortest, even though empowered by statute to charge a mileage rate for carriage (*o*).

(*f*) Gill *v.* M. S. & L. Ry. Co. (1873), L. R. 8 Q. B. 186; 42 L. J. Q. B. 89; see also Hudson *v.* Baxendale (1857), 2 H. & N. 575; 27 L. J. Ex. 93.

(*g*) Richardson *v.* N. E. Ry. Co. (1872), L. R. 7 C. P. 75; 41 L. J. C. P. 60. See also Barbour *v.* S. E. Ry. Co. (1876), 34 L. T. 67; which was a case of furniture improperly packed by the consignor, and the carriers were held not liable.

(*h*) Farrant *v.* Barnes (1862), 11 C. B. N. S. 553; 31 L. J. C. P. 137, which was the case of a carboy of nitric acid bursting while being carried from London to Croydon and injuring the plaintiff; and see Brass *v.* Maitland (1856), 6 E. & B. 470; 26 L. J. Q. B. 49; which was a case of chloride of lime.

(*i*) 29 & 30 Vict. c. 69.

(*k*) Crouch *v.* L. & N. W. Ry. Co. (1854), 14 C. B. 255; 23 L. J. C. P. 73.

(*l*) Johnson *v.* Midland Ry. Co. (1849), 4 Exch. 367; 18 L. J. Ex. 366; and Oxlade *v.* N. E. Ry. Co. (1864), 15 C. B. N. S. 680; 26 L. J. C. P. 129.

(*m*) Pickford *v.* Grand Junct. Ry. Co. (1841), 8 M. & W. 372; 10 L. J. Ex. 342.

(*n*) Taylor *v.* G. N. Ry. Co. (1866), L. R. 1 C. P. 385; 35 L. J. C. P. 210.

(*o*) Myers *v.* L. & S. W. Ry. Co (1869), L. R. 5 C. P. 1; 39 L. J. C. P. 57.

Special Contracts with Carriers.

PEEK *v.* NORTH STAFFORDSHIRE RAILWAY CO. (1863) [76]

[10 H. L. C. 443; 32 L. J. Q. B. 241.]

Mr. Peek, of Stoke-upon-Trent, wanted to send some marble chimney-pieces from there to London, and to get it done as cheaply as possible. With that view he opened negotiations with an agent of the North Staffordshire Railway Company. The agent said the company would not be responsible for damage to the chimney-pieces unless the value was declared, and they were insured at the rate of 10 per cent. on the declared value. This rate Peek considered too high, and finally he sent a note to the agent requesting him to send the chimney-pieces "not insured."

The marble received injury on the journey through exposure to rain and wet, and Peek now sought to make the company responsible for the whole of the damage done.

The two chief questions were—

1. Whether the condition was "just and reasonable;"
2. Whether there was a "special contract signed;"

and both these questions were decided in the plaintiff's favour.

Public notices.

Before 1830 common carriers were accustomed to get rid of their common law liability as insurers of the goods committed to them by *posting up notices*. If it could be shown that the notice had come to the knowledge of the customer, he was presumed to have assented to its terms, and the carrier was only liable in the case of wilful misfeasance or gross negligence.

Land

The efficacy of these public notices was destroyed in 1830 by the

Carriers Act.

Land Carriers Act (*p*), but the Act reserved the carrier's right to make a special contract with his customer. The Courts, however, were in many instances very hard on the customer, holding, for example, that a notice put on the receipt given to a person delivering goods to be carried amounted to a special contract, and in 1854 further legislation was deemed to be necessary. In that year was passed the Railway and Canal Traffic Act (*q*), which still permits the making of special contracts, but provides that no one shall be bound by any such contract with a railway or canal company (1) *unless he* (*or his agent*) *has signed it* (*r*), *and* (2) *it is "just and reasonable."*

Railway and Canal Traffic Act.

Notices by land and sea carriers.

31 & 32 Vict. c. 119, s. 14, however, gives public notices a certain amount of validity in the case of land and sea carriers. The condition sought to be enforced must be published in a conspicuous manner in the office where the through booking is effected, and must also be printed in a legible manner on the receipt or freight note given by the company.

"Just and reasonable."

Whether a condition is "just and reasonable" under sect. 7 of the Railway and Canal Traffic Act is a question for the judge at the trial, subject, of course, to the review of the higher Courts.

Conditions held bad.

A condition which states that the company *will not be responsible for damage to horses*, "*however caused*," is unreasonable and bad (*s*). So is one which *disclaims responsibility for a parcel insufficiently packed* (*t*). So, too, in the case of Ashendon *v.* L. B. & S. C. Ry. Co. (*u*) (where an Italian greyhound got lost on its way from Brighton to Rochester), a condition that a railway company *would not be liable "in any case" for loss of, or damage to, a horse or dog above certain specified values, unless the value was declared*, was held bad. But "if an owner of goods to whom the full protection of the Railway and Canal Traffic Act is offered on reasonable terms, deliberately elects, for the valuable consideration of a substantial reduction in the cost of carriage, to agree to release the carriers from certain liabilities, he cannot escape from the contract so entered into, unless he can show that he has been so far overreached in the transaction as to make the agreement void at common law, or that the offer of the alternative is a fraud upon

Alternative rates.

(*p*) 11 Geo. 4 & 1 Will. 4, c. 68.

(*q*) 17 & 18 Vict. c. 31.

(*r*) But the unsigned contract would be binding *on the company*. Baxendale *v.* G. E. Ry. Co. (1869), L. R. 4 Q. B. 224; 38 L. J. Q. B. 137.

(*s*) M'Manus *v.* Lanc. & Yorks. Ry. Co. (1859), 4 H. & N. 327; 27 L. J. Ex. 201.

(*t*) Simons *v.* G. W. Ry. Co. (1856), 18 C. B. 805; 26 L. J. C. P. 25.

(*u*) (1880), 5 Ex. Div. 190; 42 L. T. 586.

the statute" (*x*). In the case of Brown *v.* M. S. & L. Ry. Co. (*y*), a Grimsby fish merchant, in consideration of getting his fish taken to London at a cheaper rate, signed a contract by which the railway company were to be relieved "from all liability for loss or damage by delay in transit, or from whatever other cause arising." It was held in the House of Lords (reversing the decision of the Court of Appeal) that the contract was reasonable, and relieved the company from liability for loss through delay in transit caused by the negligence of their servants. "The question," said Lord Watson, "as to what constitutes a reasonable condition is not a question which judges can decide, as against their successors, by anticipation; it is a question of fact in each case, depending upon the discretion of the judge who is dealing with it, and, according to my view, not of law, and must be judged of according to the circumstances in each case. No doubt there are very many valuable suggestions in the case of Peek *v.* The North Staffordshire Railway Company. But we are not dealing with a case in its circumstances similar to that, according to my apprehension of the facts of it, because there it was held that the company had really proposed to exact a rate so high, not for the honest and *bonâ fide* purpose of giving an alternative to the trader, but solely with the view of giving no alternative and compelling him to adopt one rate practically in preference to another. I cannot see in the present case the least trace of that compulsion. I cannot find anything in the character of this case to suggest to my mind that the condition is unreasonable."

The Grimsby fish merchant's case.

Amongst conditions that have been held to be "just and reasonable" may be mentioned one, that a company *shall not be liable for loss of market or other claim arising from delay or detention of any train* (*z*); another, *placing the carriage of such perishable goods, as fish or fruit, under special regulations* (*a*); and a third, *exempting the company from liability for loss or damage to live stock from suffocation*, &c. (*b*).

Conditions held good.

In the case of Goldsmith *v.* The Great Eastern Railway Company (*c*), clover seed was carried by the defendants "solely at the

Goldsmith's case.

(*x*) Per Fitzgibbon, L. J., in M'Nally *v.* Lanc. & Yorks. Ry. Co. (1880), 8 L. R. Ir. 81; M'Carthy *v.* G. W. Ry. Co. (1889), 18 L. R. Ir. 1; and Ruddy *v.* Midl. G. W. Ry. Co. (1880), 8 L. R. Ir. 224.

(*y*) (1883), 8 App. Cas. 703; 48 L. T. 473; and see the later case of Dickson *v.* G. N. Ry. Co. (1886), 18 Q. B. D. 176; 56 L. J. Q. B. 111, where a notice by a railway company exempting themselves from liability for valuable dogs was held just and reasonable.

(*z*) White *v.* G. W. Ry. Co. (1857), 2 C. B. N. S. 7; 26 L. J. C. P. 158.

(*a*) Beal *v.* South Devon Ry. Co. (1860), 5 H. & N. 875; 29 L. J. Ex. 441.

(*b*) Pardington *v.* South Wales Ry. Co. (1856), 1 H. & N. 392; 26 L. J. Ex. 105.

(*c*) (1881), 41 L. T. 181; 29

risk of the sender, with the exception that the company shall be responsible for any wilful act or wilful default of the company." The goods were misdelivered, so that they did not arrive at their proper destination till after a fortnight's delay. It was held that there was nothing in the special contract to free the defendants from their liability as carriers.

Gordon's case.

In another case (*d*), a man delivered some cattle to a railway company to be taken from Waterford to Gloucester, and prepaid the carriage. The clerk, however, stupidly forgot to put "carriage paid" on the consignment note, and the consequence was that delivery was refused at Gloucester till the mistake was rectified, and the cattle had been for some time exposed to the weather. According to the terms of the contract of carriage, the company, in consideration of an alternative reduced rate, were "not to be liable in respect of any loss or detention of, or injury to, the said animals, or any of them, in the receiving, forwarding, or delivery thereof, except upon proof that such loss, detention, or injury arose from the wilful misconduct of the company or its servants." It was held that the withholding of the cattle under a groundless claim to retain them was not "detention" within the condition, and that the company were therefore liable. The Court also were inclined to think that the company had been guilty of "wilful misconduct," but it was unnecessary to decide that point.

Stevens' case.

The more recent case of Stevens *v.* G. W. Ry. Co. (*e*), was a case of misdelivery of goods consigned at owner's risk rate with protection against "wilful misconduct on the part of the company's servants." It was held that the mere misdelivery was not evidence of wilful misconduct, the plaintiff must go further and show how it occurred.

The 7th section of the Railway and Canal Traffic Act has no application to goods left at a railway cloak room (*f*), nor to contracts by railway companies to carry over other lines (*g*); but it extends to their sea traffic (*h*).

W. R. 651. See also the recent cases of Cutler *v.* North London Railway (1887), 19 Q. B. D. 64; 56 L. J. Q. B. 648; and Mallet *v.* G. E. Ry. Co., [1899] 1 Q. B. 309; 68 L. J. Q. B. 256.

(*d*) Gordon *v.* G. W. Ry. Co. (1881), 8 Q. B. D. 44; 51 L. J. Q. B. 58.

(*e*) (1885), 52 L. T. 324, distinguishing Hoare *v.* G. W. Ry. Co. (1879), 37 L. T. 186; 25 W. R. 63. For list of conditions which have been held to be reasonable, see Hodges on Railways, p. 568 (7th ed.).

(*f*) Van Toll *v.* S. E. Ry. Co. (1862), 31 L. J. C. P. 241; 12 C. B. N. S. 75; and see the recent case of Pratt *v.* S. E. Ry. Co., [1897] 1 Q. B. 718; 66 L. J. Q. B. 418.

(*g*) Zunz *v.* S. E. Ry. Co. (1869), L. R. 4 Q. B. 539; 38 L. J. Q. B. 209.

(*h*) 31 & 32 Vict. c. 119; and see Cohen *v.* S. E. Ry. Co. (1876), 1

By sect. 2 of the Railway and Canal Traffic Act every railway company and canal company must afford all reasonable facilities for receiving, forwarding, and delivering traffic upon and from their railways and canals; and no undue or unreasonable preference may be given to or in favour of any particular person or company, or any particular description of traffic, in any respect whatsoever. Whether in particular circumstances there has been an undue or unreasonable preference, advantage, prejudice, or disadvantage, is a question of fact, and is generally determinable by the Railway Commissioners (*i*). Reasonable facilities. No preference.

Land Carriers Act.

MORRITT *v.* NORTH EASTERN RAILWAY CO. [77]

(1876)

[1 Q. B. D. 302; 45 L. J. Q. B. 289.]

Mr. Morritt was a passenger by the defendants' railway from York to Darlington, and had with him two water-colour drawings tied by a rope face to face. They were above the value of £10, but he made no declaration of their value. He handed them to the guard, asking him to take care of them, and saw them labelled "Darlington." When the train reached Darlington, Morritt got out, took a fresh ticket to Barnard Castle, and told the porter to see that the drawings were taken out and put into the Barnard Castle train. The drawings, however, were not taken out, but were carried on to Durham, and when Morritt saw them again they had been greatly injured, "holes having been made in them."

Ex. D. 217; 2 Ex. D. 253; 45 L. J. Ex. 298; 46 L. J. Ex. 417.

(*i*) See Phipps *v.* L. & N. W. Ry. Co., [1892] 2 Q. B. 229; 61 L. J. Q. B. 379; and the cases there referred to. See also Anderson *v.* Midland Ry. Co., [1902] 1 Ch. 369; 71 L. J. Ch. 89.

The question was, whether the Carriers Act applied to the case of goods *negligently carried beyond the point of destination* so as to protect the railway company, and it was held that it did.

"Bankers and others."

In the good old times it was the frequent practice of "bankers and others" to send "articles of great value in small compass," such as cases of jewellery, by the public conveyance without telling the carrier what he was carrying, and then afterwards, if the things were lost, to come down on the unfortunate man for compensation.

Act of 1830.

To protect him against this manifest unfairness, the Land Carriers Act of 1830 (*k*) was passed. Its object is twofold: —

(1.) The carrier is *to be informed* when he is carrying anything particularly valuable, so that he may give it a corresponding amount of protection.

(2.) In recognition of the extra responsibility and trouble, he is to have *extra pay*.

The Carriers Act, it is to be observed, *applies only to carriers by land*. But when there is one entire contract to carry *partly by land and partly by sea*, the contract is divisible, and *during the land journey* the carrier is within the protection of the Act (*l*).

"Articles of great value in small compass."

Put shortly, the 1st section of the Act provides that no land carrier is to be liable for the loss of, or injury to, any one of certain specified "articles of great value in small compass" (*m*) contained in any parcel or package *when the value of the article exceeds* £10, unless the person delivering it to the carrier *declares its value and agrees to pay more* for its carriage; and the construction placed on the section is that it protects the carrier in all cases of loss or injury by *accident or negligence*, but does not protect him against the consequences of his *wilful misfeasance* (*n*), nor against delay without loss (*o*).

Christmas cards mistaken for sealskins.

The leading case was followed in the case of Millen *v.* Brasch (*p*). The defendants in that case were carriers from London to Rome, and received the plaintiff's trunk containing silks and sealskins

(*k*) 11 Geo. 4 & 1 Will. 4, c. 68.

(*l*) Le Conteur *v.* L. & S. W. Ry. Co. (1865), L. R. 1 Q. B. 54; 35 L. J. Q. B. 40.

(*m*) The words quoted from the preamble, however, are not of any real importance. A *large* looking-glass, for instance, is within the section. Owen *v.* Burnett (1834), 2 Cr. & M. 353; 4 Tyr. 133.

(*n*) Hinton *v.* Dibbin (1842), 2 Q. B. 646; 2 G. & D. 36.

(*o*) Hearn *v.* L. & S. W. Ry. Co. (1855), 10 Ex. 793; 24 L. J. Ex. 180.

(*p*) (1882), 10 Q. B. D. 142; 52 L. J. Q. B. 127.

worth £40, no value being declared, for Italy. Somehow they made a mistake between the plaintiff's trunk and a case of Christmas cards consigned to somebody at New York, sending the silks and sealskins to America and the Christmas cards to Italy. In their defence, the carriers claimed the protection of the Carriers Act; but the plaintiff contended that they were not entitled to it, because they were wrongdoers in having sent the trunk on the wrong road, and not on the journey contracted for. To this objection, however, Merritt *v.* The North Eastern Railway Co. was held to be a conclusive answer. It was also held in Millen *v.* Brasch that the carrier was not deprived of the protection of the Act by the fact that the loss of the goods was temporary and not permanent; and that the plaintiff was not entitled—on this point the Court of Appeal reversing the decision of the Court below—to recover as damages the cost of the re-purchase of other articles at Rome at enhanced prices in place of those temporarily lost.

Meaning of "value."

The word "value" in the 1st section means the value *to the consignor*, so that, if he was selling the articles to Jones for £12, it is of no consequence that he had bought them the day before from Brown for £9 (*q*). "He may have had them as a gift," remarked Lord Coleridge, C. J., "and is the value nothing to him because he has really paid nothing for them?"

Decisions as to articles enumerated.

The part of the section which has been the most litigated is the part specifying the "articles of great value in small compass." *Painted carpet designs*, it has been held, are not "paintings" (*r*). *Hat bodies made partly of fur and partly of wool* are not "furs" (*s*). *German silver fuzee boxes* are not "trinkets" (*t*). But a *chronometer* is a "time-piece" (*u*). The word "writings," it has been held in a county court case (*x*), will include the manuscript of an author. In "pictures" *frames* are included (*y*). A *packed waggon* sent for carriage by a railway company, containing articles of the specified kind and put on a truck, is a "parcel or package" within the section (*z*).

The declaration of the value and nature of the goods must be

(*q*) Blankensee *v.* L. & N. W. Ry. Co. (1881), 45 L. T. 761.

(*r*) Woodward *v.* L. & N. W. Ry. Co. (1878), 3 Ex. Div. 121; 47 L. J. Ex. 263.

(*s*) Mayhew *v.* Nelson (1833), 6 C. & P. 58.

(*t*) Bernstein *v.* Baxendale (1859), 6 C. B. N. S. 251; 28 L. J. Ch. 265.

(*u*) Le Conteur *v.* L. & S. W. Ry. Co., *supra*.

(*x*) Lawson *v.* L. & S. W. Ry. Co., Law Times, June 24, 1882.

(*y*) Henderson *v.* L. & N. W. Ry. Co. (1870), L. R. 5 Ex. 90; 39 L. J. Ex. 55.

(*z*) Whaite *v.* Lanc. & Yorks. Ry. Co. (1874), L. R. 9 Ex. 67; 43 L. J. Ex. 47.

made at the time of delivery, whether that be at the carriers' office, at the sender's house, on the road, or elsewhere (*a*).

Thefts by carriers' servants.

Sect. 8 of the Carriers Act provides that the carrier shall be responsible for the felonious acts of his servants, notwithstanding that the customer may not have declared and insured his goods. This section, however, "cannot be construed as a general enactment that common carriers by land are in all cases to be liable for theft by their servants. The terms of the section confine it to the case of the valuables specified in the Act"; per Wright, J., in the case of Shaw *v.* Great Western Railway Co. (*b*), where it was held that the neglect or default of a railway company or its servants mentioned in sect. 7 of the Railway and Canal Traffic Act, 1854 (*c*), does not extend to acts of a servant beyond the scope of his employment, such as theft. And a railway company carrying goods can therefore, like other carriers, protect itself by special contract against theft of the goods even by its own servants, and the statutory requirement that the contract shall be reasonable does not apply. The section has been so construed that, while, on the one hand, the customer need not give evidence that would fix any particular servant with the theft (*d*), on the other, it is not sufficient for him merely to show that nobody had a better opportunity of stealing his things than the company's servants (*e*). The servant of a carrier employed by a railway company is a servant of the company for the purposes of the section (*f*), but the company may show that the thief falsely represented himself to be the carriers' servant (*g*).

Horses, sheep, pigs, &c.

The 7th section of the Railway and Canal Traffic Act (*h*) provides that no greater damage than £50 for a horse, £15 for any neat cattle per head, and £2 for a sheep or pig, shall be recovered unless a higher value has been previously declared.

(*a*) Baxendale *v.* Hart (1851), 6 Ex. 769; 21 L. J. Ex. 123.

(*b*) [1894] 1 Q. B. at p. 383; 70 L. T. 218.

(*c*) 17 & 18 Vict. c. 31.

(*d*) Vaughton *v.* L. & N. W. Ry. Co. (1874), L. R. 9 Ex. 93; 43 L. J. Ex. 75.

(*e*) McQueen *v.* G. W. Ry. Co. (1875), L. R. 10 Q. B. 569; 49 L. J. Q. B. 130.

(*f*) Machu *v.* L. & S. W. Ry. Co. (1848), 2 Ex. 415; 17 L. J. Ex. 271.

(*g*) Way *v.* G. E. Ry. Co. (1876), 1 Q. B. D. 692; 45 L. J. Q. B. 874.

(*h*) 17 & 18 Vict. c. 31.

Passengers' Luggage.

BUNCH *v.* GREAT WESTERN RAILWAY CO. [78]

(1888)

[13 App. Cas. 31; 57 L. J. Q. B. 361.]

The plaintiff arriving at Paddington Station, more than half-an-hour before her train was timed to start, entrusted to a porter, on his assurance that it would be quite safe in his custody, a Gladstone bag, which she expressed a wish to have in the carriage with her. She then "went away" for ten minutes to meet her husband on the premises of the company, and to get a ticket. When she returned, the bag, which had not been put in the railway carriage at all, was missing. For this loss the Great Western Railway Company were held liable.

In this leading case Lord Halsbury, L. C., and Lords Watson, Herschell, and Macnaghten (Lord Bramwell dissenting), expressed the opinion that a railway company accepting passengers' luggage *to be carried in a carriage with the passenger*, enter into a contract as *common carriers, subject to this modification*, that in respect of his interference with their exclusive control of his luggage, the company are not liable for any loss or injury occurring during its transit, to which the act or default of the passenger has been contributory. The result of this case is to disapprove the reasoning in Bergheim *v.* Great Eastern Railway Co. (*i*), and to approve that of Richards *v.* London, Brighton and South Coast Railway Co. (*k*). Talley *v.* Great Western Railway Co. (*l*). and Butcher *v.* London and South Western Railway Co. (*m*); and to decide that, in the absence of contributory negligence on the part of the passenger, railway companies are insurers of luggage carried in the traveller's own compartment, as well as of that carried *in the van*.

(*i*) (1878), 3 C. P. D. 221; 47 L. J. C. P. 318. See an able discussion of this subject in the Law Quarterly Review, 1886, p. 469.

(*k*) (1849), 7 C. B. 839; 18 L. J. C. P. 251.

(*l*) (1870), L. R. 6 C. P. 44; 40 L. J. C. P. 9.

(*m*) (1855), 16 C. B. 13; 24 L. J. C. P. 137.

Personal luggage, what is.

Such luggage, however, must not be *merchandise*, but simply the *personal luggage* of the passenger. So far as a rule can be extracted from a number of conflicting decisions, by "personal luggage" is meant *whatever the traveller takes with him for his personal use and convenience, according to the habits and wants of his class, either with reference to the immediate necessities, or to the ultimate purpose, of his journey* (*u*). About most of the things that sensible people are in the habit of taking with them on journeys, there can, of course, be no dispute. But the *bedding* which a man is carrying with a view to the time when he shall have provided himself with a home (*n*), the *sketches* of an artist (*o*), the *title-deeds* of a client which a solicitor is taking to produce at a trial (*p*), a *bicycle* (*q*), and a *toy rocking-horse* (*r*), have been held *not* to be personal luggage. An eminent county court judge has held that *a hamper of fowls, apples, and vegetables, intended as a present to a friend*, is personal luggage (*s*); but the decision appears to be hardly consistent with the authorities.

If the company carry goods without objection, though well aware that they are not personal luggage, they will be liable (*t*).

Porters taking charge of luggage.

A company employing porters in the usual way are responsible for passengers' luggage, not merely while it is being carried on the journey, but also while it is in course of translation from cab to train or train to cab (*u*). There seems, however, to be a little doubt on the subject of luggage left on the platform, even though a porter may have taken charge of it. The London and North Western have been held (*x*) not liable for the loss of a portmanteau which an intending passenger from Manchester to Hull gave to a porter on arriving in a cab at the Manchester station. The porter left the portmanteau on the platform, where the intending passenger found it soon afterwards; and, as he could not find another porter, he labelled it himself. Then he went away for a little time; and when he came back the portmanteau had disappeared. But the

Agrell's case.

(*u*) Macrow *v.* G. W. Ry. Co. (1871), L. R. 6 Q. B. 612; 40 L. J. C. P. 300.

(*o*) Mytton *v.* Midl. Ry. Co. (1859), 4 H. & N. 615; 28 L. J. Ex. 398.

(*p*) Phelps *v.* L. & N. W. Ry. Co. (1865), 19 C. B. N. S. 321; 34 L. J. C. P. 259.

(*q*) Britten *v.* G. N. Ry. Co., [1899] 1 Q. B. 243; 68 L. J. Q. B. 75.

(*r*) Hudston *v.* Midl. Ry. Co. (1869), L. R. 4 Q. B. 366; 38 L. J. Q. B. 213.

(*s*) Case *v.* L. & S. W. Ry. Co. (1880), 68 L. T. 176.

(*t*) Cahill *v.* L. & N. W. Ry. Co. (1861), 13 C. B. N. S. 818; 31 L. J. C. P. 271; and G. N. Ry. Co. *v.* Shepherd (1852), 8 Ex. 30; 21 L. J. Ex. 286.

(*u*) Richards *v.* L. B. & S. C. Ry. Co.; Butcher *v.* L. & S. W. Ry. Co.; and Bunch *v.* G. W. Ry. Co., *supra*.

(*x*) Agrell *v.* L. & N. W. Ry. Co., *printed in a note to* Leach *v.* S. E. Ry. Co. (1876), 34 L. T. 134.

Court seems to have thought that if, on arriving at the station, the traveller had said "Hull," and the porter had replied "All right," the company would have been responsible; and, indeed, this point would seem to be clear from the case of Lovell *v.* London, Chatham and Dover Railway (*y*). The only thing is, you must not go to a station about two hours before your train starts, and expect the railway company to be insurers of your luggage all that time. Lovell's case.

In a modern case (in which a lady's maid coming from Malvern lost her box at Paddington), it has been held that, in regard to a passenger's luggage on the train's arriving at the station he gets out at, it is the company's duty to have the luggage ready at the usual place of delivery, while it is the passenger's duty to remove it within a reasonable time (*z*). After that, it would seem that the company's liability is that of warehousemen (*a*). The lady's maid's case.

Hodkinson *v.* L. & N. W. Ry. Co. (*b*) was the case of an unfortunate governess who lost her box. She arrived at a station of the defendants (Ashton-under-Lyne), and one of the company's porters took her luggage from the van. "Would she have a cab?" "No, she would walk and send for her luggage." "All right, mum," said the porter, "I'll put them on one side, and take care of them." The governess went off, and so did the luggage; for two hours afterwards, when it was wanted, it could not be found. It was held that the company were not responsible for the loss. They had delivered the luggage in the proper way, and the woman's redelivery of it to the porter could not be taken to affect them. "Patscheider *v.* Great Western Railway Company," said Lord Coleridge, C. J., "is clearly distinguishable; there the plaintiff had no opportunity of taking possession of her box. Possibly the porter may be responsible for the loss; but the company clearly are not." The governess's case.

In respect of articles deposited at the cloak-room, a railway company's rights and liabilities are those of common carriers, and not merely those of warehousemen. "I think," said the present Master of the Rolls (then Collins, J.), in a recent case (*c*), "that Cloak rooms.

(*y*) (1876), 45 L. J. Q. B. 476; 34 L. T. 127. See also Welch *v.* L. & N. W. Ry. Co. (1885), 34 W. R. 166.

(*z*) Patscheider *v.* G. W. Ry. Co. (1878), 3 Ex. D. 153; 38 L. T. 149. See also Firth *v.* N. E. Ry. Co. (1888), 36 W. R. 467.

(*a*) Chapman *v.* G. W. Ry. Co. (1880), 5 Q. B. D. 278; 49 L. J. Q. B. 420; and see Mitchell *v.* Lanc. & Y. Ry. Co. (1875), L. R. 10 Q. B. 256; 44 L. J. Q. B. 107; and Heugh *v.* L. & N. W. Ry. Co. (1870), L. R. 5 Ex. 51; 39 L. J. Ex. 48.

(*b*) (1884), 14 Q. B. D. 228; 32 W. R. 662.

(*c*) Singer Manufacturing Co. *v.* L. & S. W. Ry. Co., [1894] 1 Q. B. 833; 63 L. J. Q. B. 411; and see sect. 2 of the Railway and Canal Traffic Act, 1854 (17 & 18 Vict. c. 31).

having regard to modern decisions and the rising standard of convenience to which railway companies are obliged to conform, the cloak room is now to be regarded simply as one of the necessary and reasonable facilities incident to the carriage of passengers and their baggage."

Printed conditions.

But companies are in the habit of attempting to vary the ordinary contract of bailment by issuing tickets containing conditions. If the customer reads the conditions and makes no objection, he will be bound by them; and so he will be if he is aware that there are conditions and does not take the trouble to look at them, or thinks it better not to (*d*). But generally he will not be bound by the conditions if he did not read them and was not aware of their existence (*e*). A case of importance on this subject is Watkins *v.* Rymill (*f*), where the plaintiff had delivered to the defendant a waggonette to be sold, and had taken from him a printed form containing a receipt for the waggonette, followed by the words, "*subject to the conditions as exhibited upon the premises.*" The plaintiff was held to be bound by the conditions, though he had put the document into his pocket without looking at it. On this case Sir Frederick Pollock, in his admirable book on "Contracts" (*g*), remarks, "Are reasonable means of knowledge equivalent to actual knowledge? It seems better on principle to say that actual knowledge may be inferred as a fact from reasonable means of knowledge, and inferred against the bare denial of the party whose interest it was not to know. This is one of the rules of evidence which are apt in particular departments to harden into rules of law, and the judgment in Watkins *v.* Rymill certainly tends in this direction. It would be curious, however, if, after 'constructive notice' has been justly discredited in equity cases, a new variety of it should be introduced in a question of pure common law." "The result, as it stands at present, appears to be that it is a question of fact whether the notice given in each case was reasonably sufficient to inform the party receiving it at the time of making the contract that the party giving it intended to

Watkins *v.* Rymill.

(*d*) Harris *v.* G. W. Ry. Co. (1876), 1 Q. B. D. 515; 45 L. J. Q. B. 729; and see Acton *v.* Castle Mail Packets Co. (1896), 73 L. T. 158; 8 Asp. M. C. 73; and Duckworth *v.* L. & Y. Ry. Co. (1901), 84 L. T. 774; 49 W. R. 541.

(*e*) Parker *v.* S. E. Ry. Co. (1876), 2 C. P. D. 416; 46 L. J. C. P. 768; Henderson *v.* Stevenson (1875), L. R. 2 H. L. Sc. 470; 32 L. T. 709; Richardson *v.* Rowntree, [1894] A. C. 217; 63 L. J. Q. B. 283; and see Anson on the Law of Contract, pp. 21—23 (8th ed.).

(*f*) (1883), 10 Q. B. D. 178; 52 L. J. Q. B. 121; and see Woodgate *v.* G. W. Ry. Co. (1884), 51 L. T. 826; 33 W. R. 428.

(*g*) P. 48 (*y*) (5th ed.).

contract only on special terms. A person who, knowing this (*h*), enters into the contract, is then deemed to assent to the special terms; but this, again, is probably subject to an implied condition that the terms are relevant and reasonable. It cannot be said that the subject is yet free from doubt" (*i*).

Liability to whom.

The liability of a railway company for passengers' luggage, it may be mentioned, is to the passenger travelling with it, though it may not be really his property (*k*). Thus, a man sending on his luggage by a servant cannot sue for its loss (*l*). So it does not matter who paid the fare: a servant, for instance, can sue for loss of luggage though the ticket was taken by his master (*m*).

Loss off line.

Companies sometimes issue tickets stating that they do not hold themselves responsible for loss or injury arising "*off their own lines.*" To bring themselves within such a condition a railway company must show that the luggage when lost was *out of their custody:* so that if it is lost at a station which they have the use of by agreement with another company, they will not be protected (*n*).

Hooper's case.

In Hooper *v.* L. & N. W. Ry. Co. (*o*), the plaintiff had taken a G. W. through ticket from Stourbridge to Euston, changing at Birmingham into a train of the defendants. He saw his portmanteau transferred from the G. W. to the L. & N. W. train, but at Euston it was missing. Notwithstanding that his contract was with the G. W. people, he was held entitled to sue the L. & N. W. Co. as for a breach of duty.

Suing in tort.

Independently altogether of contract, the traveller may bring an action against a railway company who had taken his portmanteau to be carried, and then negligently lost it. On this point, see *post*, p. 500.

(*h*) See Richardson *v.* Rowntree, *supra*.

(*i*) Pollock on Contracts, pp. 49—50 (7th ed.).

(*k*) See Meux *v.* G. E. Ry. Co., [1895] 2 Q. B. 387; 64 L. J. Q. B. 657, where it was held that a servant's livery, although the property of his master, is the servant's personal luggage when he is a passenger by a railway.

(*l*) Becher *v.* G. E. Ry. Co. (1870), L. R. 5 Q. B. 241; 39 L. J. Q. B. 122.

(*m*) Marshall *v.* York, &c. Ry. Co. (1851), 11 C. B. 655; 21 L. J. C. P. 34; and see Austin *v.* G. W. Ry. Co. (1867), L. R. 2 Q. B. 442; 36 L. J. Q. B. 201.

(*n*) Kent *v.* Midl. Ry. Co. (1874), L. R. 10 Q. B. 1; 44 L. J. Q. B. 18.

(*o*) (1880), 50 L. J. Q. B. 103; 43 L. T. 570; decided on the authority of Foulkes *v.* Met. Ry. Co. (1880), 5 C. P. D. 157; 49 L. J. C. P. 361; and disregarding Mytton *v.* Midl. Ry. Co. (1859), 28 L. J. Ex. 398; 4 H. & N. 615, as an authority. See also Elliott *v.* Hall (1885), 15 Q. B. D. 315; 54 L. J. Q. B. 518.

Trains behind Time, &c.

[79] DENTON *v.* GREAT NORTHERN RAILWAY CO.

(1856)

[5 E. & B. 860; 25 L. J. Q. B. 129.]

On the 25th of March, 1855, Mr. Denton, an engineer of some eminence, had occasion to go from Peterborough to Hull, where he had an appointment for the next morning. He consulted the G. N. R. Company's time-tables, and found there was a train leaving Peterborough at 7 p.m., due at Hull about midnight. This just suited him, so he took his ticket for Hull and started by it. But when he got to Milford Junction, he was informed by an official that the late train to Hull had been discontinued, and that he could not get there that night. The fact was, that the line from Milford Junction to Hull belonged to the North Eastern Railway Company, who till March 1st had run a train departing a few minutes after the arrival of the train leaving Peterborough at 7 p.m. But it had not run at all during March, and the Great Northern Railway Company had published their March time-tables, though they had had notice that it would not run. In consequence of the absence of this train, Mr. Denton did not get to Hull in time to keep his appointment, and sustained damage to the amount of £5 10*s.*, for which he sought to make the Great Northern Railway Company liable. He was successful. The company were held liable, on the grounds—

1st. That they had been guilty of a false representation. "It is all one," said Lord Campbell, "as if a person duly authorized by the company had, knowing it was not true, said to the plaintiff, 'There is a train from Milford Junc-

tion to Hull at that hour.' The plaintiff believes this, acts upon it, and sustains loss. It is well-established law that where a person makes an untrue statement, knowing it to be untrue, to another, who is induced to act upon it, an action lies. The facts bring the present case within that rule."

2nd. That the time-tables amounted to a contract.

LE BLANCHE *v.* LONDON & NORTH WESTERN RAILWAY CO. (1876) [80]

[1 C. P. D. 286; 45 L. J. C. P. 521.]

Mr. Le Blanche took a first-class ticket of the London and North Western Company to go from Liverpool to Scarborough by the 2 p.m. train, which, the time-tables told him, would arrive at Scarborough at 7.30 p.m. Mr. Le Blanche's journey lay by Leeds and York, at each of which places it was necessary for him to change and get into a train *not* belonging to the London and North Western Company. The train was 27 minutes late at Leeds, and, in consequence of that, Mr. Le Blanche missed the train he ought to have caught, and did not arrive at York till 7 o'clock, which was too late for the train on, which arrived at Scarborough at 7.30. On inquiry, he was informed that the next train would leave York at 8 and get to Scarborough at 10. Most men under these circumstances would have spent an hour in dining, or looking at the old city. Not so Mr. Le Blanche. He instantly ordered a special train, and arrived at Scarborough about half-past eight.

He now brought an action to recover the money he had paid for the special train—nearly £12; but, in spite of the

delay being traced to negligence, he did not get the money, because, though it is a sound principle of law that if the party bound to perform a contract does not perform it, the other party may do so for him as reasonably near as may be and charge him for the reasonable expense incurred in so doing, *yet he may not perform it unreasonably and oppressively*, and it was ridiculous for a man to take a special train merely for the purpose of getting to a pleasant place an hour earlier.

Common law duty.

The duty of a carrier of passengers at common law is simply to deliver them at their destination within a reasonable time; and it has been expressly held that the mere granting of a ticket imposes on a railway company no obligation to have a train ready to start at a definite time (*p*). Railway companies are bound to use reasonable care and diligence in the conveyance of passengers; but they are not *common carriers* of passengers, and are not under an obligation to carry safely. The recent case of the East Indian Railway *v.* Kalidas Mukerjee (*q*) before the Privy Council is a good illustration of this. The appellant's son was killed by an explosion of bombs brought by passengers into a railway carriage. There was no evidence of the appearance or dimensions of the parcels, or that any servant of the company knew or had reason to suspect the character of the parcels, which were taken into the carriage according to the common practice. It was held that the company was not liable, and was not under obligation to disprove that the parcels suggested danger, or to search every parcel carried by a passenger.

Bombs in a railway carriage.

Varied by time-tables.

"Every attention."

But railway companies invariably issue time-tables and conditions so as to vary their common law liability; and the issue of such time-tables amounts to an express contract with the public. The usual condition which the companies seek to enforce is, that "*though every attention will be paid to ensure punctuality, they do not warrant the departure or arrival of the trains at the times specified in the time bills*"; and the meaning of this and similar conditions is frequently discussed. On the whole it is clear that a company cannot contract itself in this way out of its liability to be reasonably

(*p*) Hurst *v.* G. W. Ry. Co. (1865), 19 C. B N. S. 310; 34 L. J. C. P. 264.

(*q*) [1901] A. C. 396; 70 L. J. P. C. 63; explaining Collett *v.* L. & N. W. Ry. Co. (1850), 16 Q. B. 984; 20 L. J. Q. B. 411.

punctual. But, on the other hand, it is not to be held liable *merely because a train is late* (*r*). It must be affirmatively shown that the lateness is due to neglect to pay the "every attention" which is promised. No doubt the extreme lateness of a train would suggest a presumption of such negligence; but it would be open to the company to rebut it by showing that it was due to a fog, or a strong wind, or the slippery state of the rails, or a flood, or to some other circumstance over which they had no control (*s*). Unavoidable lateness.

The case of Woodgate *v.* The Great Western Railway Company (*t*) is of importance on this branch of the law. The plaintiff, Mr. Woodgate, was a barrister, who on Christmas Eve, 1881, took a first-class return ticket from Paddington to Bridgnorth, a station on a branch line of the defendants. The ticket had "*See back*" on one side (only on the return half), and "*Issued subject to the conditions stated on the company's time bills*" on the other. The "time bills" were published monthly in a book of about one hundred pages, and on the first page was a notice, headed "*Train Bills*," that the company would not be accountable for injury which might arise from delays, unless in consequence of the wilful misconduct of the company's servants. By reason of its being Christmas time, of the weather being foggy, and of there having been a collision some hours before, Mr. Woodgate did not arrive at his destination so speedily as he could have wished. In fact, his journey took ten hours instead of six as advertised. In an action which he proceeded to bring against the railway company, it was held, upon a special case, that the conditions on the time bills were incorporated in the plaintiff's contract with the company, and that there was no evidence of their wilful misconduct or liability. "I hold," said Smith, J., "in accordance with the decision in the case of Le Blanche *v.* London and North Western Railway Company, that the taking of the ticket, the time-table, and the conditions formed the contract under which the Great Western Railway Company undertook to carry Mr. Woodgate. Then, that being my opinion, the question arises, what is the meaning of the contract? . . . . I think no man can read this clause without coming to one conclusion. It does not say, 'We will be liable in no case,' but it simply says this: 'If you, as a passenger, have incurred any loss, inconvenience, or injury by reason of delay or detention, we will compensate you if you prove it is by the wilful misconduct of our servants, but otherwise not.'" Mr. Woodgate's Christmas Eve.

(*r*) See Duckworth *v.* L. & Y. Ry. Co. (1901), 84 L. T. 774; 49 W. R. 541.

(*s*) See Fitzgerald *v.* Midl. Ry. Co. (1876), 34 L. T. 771.

(*t*) (1884), 51 L. T. 826; 33 W. R. 428; and see M'Cartan *v.* N. E. Ry. Co. (1885), 54 L. J. Q. B. 441.

No room.

An action may be maintained by a traveller for whom, though the train starts as advertised, there is no room. "This was held in the case of Hawcroft *v.* Great Northern Railway Company (*u*), where the plaintiff was a Barnsley confectioner, who took an excursion return ticket to go up to London and see the Great Exhibition of 1851. The excursion train by which he proposed on a Saturday morning to return was so full that he could not get a seat, and, as the company would not allow him to go by one of their ordinary trains, he was kept at King's Cross station till late in the evening. When at last he did get a train, he found that it took him no further than Doncaster, where he arrived on Sunday morning. The Barnsley confectioner, however, wanted to get back to his family as quickly as possible, so (there being no Sunday trains) he hired a carriage and drove from Doncaster to Barnsley. Under these circumstances the company were held liable. 'I do not think,' said Patterson, J., 'that they had any right to keep him in London until the 9.45 evening train. They should have sent another train. The case finds that they might have done so without danger.'"

The Barnsley confectioner's trip to London.

What damages.

Business engagement.

The miller's case.

Assuming that an action lies, there is a further question as to the damages obtainable. It is a clear rule that *damages cannot be obtained for the loss of a business engagement*, such loss not being in the contemplation of both parties at the time of contracting. The case of Buckmaster *v.* The Great Eastern Railway Company (*x*), where a Suffolk miller who missed his market recovered £10 in respect of loss of business, is not really a violation of this rule, because probably the train was specially run on the particular day and at the particular time to enable people to attend the Mark Lane Corn Market, and it was for that purpose, as the company knew, that the plaintiff had taken a season ticket. Nor can damages be obtained for the *disappointment and annoyance* which the traveller will naturally feel. But damages may be obtained for *personal inconvenience*. A well-known case on this point is Hobbs *v.* The London and South Western Railway Company (*y*), where a family party took tickets on the defendants' railway to go from Wimbledon to Hampton Court by the midnight train. They got into the train, but, unluckily for them, it did not go to Hampton Court, but went along the other branch to Esher, where they were unable to get either a conveyance or accommodation for the night. Accordingly,

Annoyance.

Inconvenience.

Mrs. Hobbs's cold.

(*u*) (1852), 21 L. J. Q. B. 178; 16 Jur. 196.

(*x*) (1870), 23 L. T. 471; and see Cooke *v.* Midl. Ry. Co. (1893), 57 J. P. 388, where a miner was held entitled to recover a day's wages which he had lost owing to an unreasonable delay in the starting of a train.

(*y*) (1875), L. R. 10 Q. B. 111; 44 L. J. Q. B. 49.

though it was a nasty wet night, they had to tramp it home, not arriving till about three o'clock in the morning; and, as one of the results, the wife caught cold and was laid up for a long time, being unable to assist her husband in his business, and having to have a doctor. In an action by the husband and wife against the company it was held that they were entitled to damages for the inconvenience suffered in consequence of being obliged to walk home, but *not for the illness* and its consequences. This distinction, however, was pretty freely commented on by the Court of Appeal in McMahon *v.* Field (*z*), where the plaintiff's horses had been turned out of an innkeeper's stables, through that person breaking his contract, and had caught cold owing to the exposure. It was held that the damage in respect of such cold was recoverable, as it was *the probable consequence* of the defendant's breach of contract, and was not, therefore, too remote. "In Hobbs *v.* London and South Western Railway Company," said Bramwell, L. J., "it was said that the damage to the wife was a secondary consequence of the breach of contract and too remote; and by way of illustration the case was given of a person walking home in the dark, who took a false step, which resulted in a fall and a broken limb; but I must say I do not see why a passenger who, by the default of the railway company, was obliged to walk home in the dark might not recover in respect of such damage, it being an event which might not unreasonably be expected to occur." "Then it is said," added Brett, L. J., "that the case is governed by that of Hobbs *v.* London and South Western Railway Company. Now, I must confess that, if I acquiesce in that case, I cannot quite agree with it. What were the facts there? . . . . The wife, in consequence of the exposure, caught a cold, and it was said that such damage was too remote to be recovered. Why was it too remote? . . . Suppose a man let lodgings to a woman, and then turned her out in the middle of the night with only her night-clothes on, would it not be a natural consequence that she would take cold?" The Lord Justice, however, distinguished the two cases in this way: "People do get out of a train and walk home at night without catching cold, and it is not nearly so inevitable a consequence that a person getting out of a train under such circumstances as in Hobbs *v.* London and South Western Railway Company should catch cold as that horses turned out, as these were in this case, should suffer. There is, therefore, a difference, though I own I do not see much, between this case and that of Hobbs *v.* London and South Western Railway Company." *Hotel expenses* entailed by the breach of contract may

McMahon *v.* Field.

The Hobbs' case.

Hotel expenses.

(*z*) (1881), 7 Q. B. D. 591; 50 L. J. Q. B. 852.

be recovered (*a*). Moreover, on the principle that, when a contracting party fails to perform his engagement, the other may perform it for himself, and send in his bill, provided he does not perform it oppressively and unreasonably, the traveller may take a carriage or special train and charge it to the company. A rough test that might be applied as to the oppressiveness is,—*supposing this person had had to pay the money out of his own pocket, would he have been in such a hurry to get to his destination?*

Special train.

Persons entitled to enter railway station.

Apart from any facilities granted by the Railway Commissioners, a railway company have the right of excluding from their stations all persons except those using or desirous of using the railway; and may impose upon the rest of the public any terms they think proper as the condition of admittance. Hotel servants accompanying hotel visitors to the railway station, or who go there for the purpose of meeting railway passengers who propose to stop at their hotel, are not themselves persons "using the railway," and consequently are not entitled as of right to enter the station (*b*).

G. N. Ry. Co. *v.* Palmer.

When a railway company issues a ticket on which a notice is printed that it is only to be used to the station named thereon, the passenger holding such ticket, provided the notice is brought home to him, is not entitled to travel beyond such station and merely pay the ordinary single fare for the extra journey travelled. Such a ticket constitutes a special contract between the railway company and the passenger (*c*).

See further as to the duties of carriers of passengers, Readhead *v.* Midland Railway Company, *post*, p. 462.

Contract of Sale.

[81] TARLING *v.* BAXTER. (1827)

[6 B. & C. 360; 9 D. & R. 272.]

On January 4th, 1825, it was in writing agreed between Baxter and Tarling that the former should sell to the latter

(*a*) Hamlin *v.* G. N. Ry. Co. (1856), 1 H. & N. 408; 26 L. J. Ex. 20.

(*b*) Perth General Station Committee *v.* Ross, [1897] A. C. 479; 66 L. J. P. C. 81.

(*c*) G. N. Ry. Co. *v.* Palmer, [1895] 1 Q. B. 862; 64 L. J. Q. B. 316.

a stack of hay then standing in Canonbury Field, Islington, at the price of £145. Payment was to be made on February 4th, but the stack was to be allowed to remain where it was till May Day. It was not to be cut till paid for. This was held to be an immediate not a prospective sale, so that when on January 20th the stack was accidentally burnt down, the loss fell on Tarling, the buyer. "The rule of law," said Bayley, J., "is that where there is an immediate sale nothing remains to be done by the vendor as between him and the vendee; the property in the thing sold vests in the vendee, and then all the consequences resulting from the vesting of the property follow, one of which is that, if it be destroyed, the loss falls on the vendee."

ACRAMAN *v.* MORRICE. (1849) [82]

[8 C. B. 449; 19 L. J. C. P. 57.]

Morrice, a timber merchant, agreed to buy from one Swift the trunks of certain oak-trees belonging to Swift and lying at his premises at Hadnock, in Monmouthshire. He marked out the timber he wanted and paid for it, and it only remained for Swift to *sever the parts not wanted* and send off the rest to the purchaser. Unfortunately, just then Swift became bankrupt. On hearing of his bankruptcy, Morrice sent his men to Hadnock, and had all the timber he had paid for carried off. Swift's assignees, however, of whom Acraman was the leading spirit, objected to this proceeding, as they considered that the property in the timber had not passed to Morrice, Swift not having severed the boughs. This contention prevailed, Wilde, C. J., saying, "Upon a contract for the sale of goods, so long as anything remains to be done to them by the seller, the

property does not pass, and the seller has a right to retain them. In the present case several things remained to be done. The buyer having selected and marked the particular parts of the trees which he wished to purchase, it became the seller's duty to sever those parts from the rest, and to convey them to Chepstow, and there deliver them at the purchaser's wharf. . . . The property clearly had not passed to the defendant, and he was guilty of a trespass and a conversion in possessing himself of it in the way he did."

When the subject-matter of a sale is clear and ascertained at the time of the contract and the price is fixed, the property in the thing sold, with all the risks, passes at once to the purchaser. To this rule, which Tarling *v.* Baxter illustrates, Acraman *v.* Morrice supplies us with an exception, viz., that *when something remains to be done by the seller, the property does not pass.* Thus, when goods, part of an entire bulk, are sold, the property in such goods does not pass until they are separated from the bulk, that is, there must be appropriation of a specific portion (*d*).

Something remaining to be done by seller.

Where the sale is of a chattel *to be made* by the seller the property does not, as a general rule, pass until the chattel is actually made and approved by the buyer. But the question whether or no the property had passed is purely one of *intention*, to be collected from all the circumstances. A Mr. Pocock ordered a boat-builder to build him a barge. The boat-builder set about it; he was paid money on account as the work proceeded, and by-and-by the name of Mr. Pocock duly appeared painted on the stern. In spite of all this, it was held that the property in the barge had not passed, and, the boat-builder having become bankrupt, that it belonged to his assignees (*e*). With this may be usefully compared a somewhat

Mucklow *v.* Mangles.

Clarke *v.* Spence.

(*d*) Dixon *v.* Yates (1833), 5 B. & Ad. 313; 2 N. & M. 177. See Addison on Contracts, pp. 539 *et seq.* (10th ed.).

(*e*) Mucklow *v.* Mangles (1808), 1 Taunt. 318; 9 R. R. 784; and see Atkinson *v.* Bell (1828), 8 B. & C. 277; 2 M. & R. 292; and the recent case of Bellamy *v.* Davey, [1891] 3 Ch. 540; 60 L. J. Ch. 778, where it was held that the fact that the subject-matter of the contract (a petroleum tank) was *to be made on the premises of the purchaser* did not make the property vest in the purchaser until completion. It should be noted, however, that the tank was not fixed to the soil, though, when completed, it would be too heavy to be moved without being taken to pieces.

later case (*f*), in which a ship-builder agreed to build a ship for a firm of merchants, the building, as it proceeded, to be superintended by an agent of the merchants' firm. A price was fixed, and it was arranged that payment should be made by instalments regulated by particular stages in the progress of the work. The Court held that the property in the materials vested in the purchaser at the time when they were put together under the approval of the superintendent, or, at all events, when the first instalment was paid. Here, the fact of the superintendence by the purchaser's agent would seem important to show an intention to pass the property as the work proceeded, for, otherwise, when one vessel had been nearly constructed the superintendent might have been called upon to begin *de novo* and superintend the building of a second. The principles applicable to the sale of part of a ship are equally applicable to the sale of part of any *corpus manufactum* in course of construction. It is quite competent for parties to agree for a valuable consideration that a specific article shall be sold and become the property of the purchaser as soon as it has reached a certain stage; and it is a question of construction in each case at what stage the property shall pass, and a question of fact whether that stage has been reached. On the other hand, materials provided by the builders as portions of the fabrics, whether wholly or partially finished, cannot be regarded as appropriated to the contract, or as "sold," unless they have been "affixed," or in a reasonable sense made part of the *corpus*. The case of Seath *v.* Moore (1886), 11 App. Cas. 350; 55 L. J. P. C. 54, should be consulted on this subject. And see Bellamy *v.* Davey, *supra*.

Where several articles are bought at a certain price per article, and the money paid, but the articles are not ear-marked or set apart for the purchaser, and some of them are not delivered, the right claim of the purchaser is for the price of the articles not delivered, as money had and received upon a consideration which has totally failed (*g*).

Sale of Goods Act, 1893.

The law as to the transfer of property on the sale of goods was codified in the following sections of the Sale of Goods Act, 1893 (*h*):—

Goods must be ascertained.

Sect. 16. "Where there is a contract for the sale of unascertained goods, no property in the goods is transferred to the buyer unless and until the goods are ascertained."

(*f*) Clarke *v.* Spence (1836), 4 Ad. & E. 470; 6 N. & M. 399; and see Inglis *v.* Stock (1885), 10 App. Cas. 263; 54 L. J. Q. B. 582; and the recent Scotch case of Carmichael *v.* Macbeth (1902), 4 F. 345.

(*g*) Biggerstaff *v.* Rowatt's Wharf, [1896] 2 Ch. 93; 74 L. T. 473.

(*h*) 56 & 57 Vict. c. 71.

The following cases may be referred to as illustrating this section, namely:—Wallace *v.* Breeds (1811), 13 East, 522; 1 Rose, 109; Austen *v.* Craven (1812), 4 Taunt. 644; 1 Marsh. 4, n.; White *v.* Wilks (1813), 5 Taunt. 176; 1 Marsh. 2; Busk *v.* Davis (1814), 2 M. & S. 397; 5 Taunt. 622, n.; Shepley *v.* Davis (1814), 5 Taunt. 617; 1 Marsh. 252; Rohde *v.* Thwaites (1826), 6 B. & C. 388; 9 D. & R. 293; Aldridge *v.* Johnson (1857), 7 E. & B. 885; 26 L. J. Q. B. 296; Gabarron *v.* Kreeft (1867), L. R. 10 Ex. 274; 44 L. J. Ex. 238.

Property passes when intended to pass.

Sect. 17. "(1.) Where there is a contract for the sale of specific or ascertained goods, the property in them is transferred to the buyer at such time as the parties to the contract intend it to be transferred."

"(2.) For the purpose of ascertaining the intention of the parties, regard shall be had to the terms of the contract, the conduct of the parties, and the circumstances of the case."

This section is illustrated by the following cases, namely:—Bishop *v.* Shillito (1819), 2 B. & A. 329, a; 20 R. R. 457, n.; Lanyon *v.* Toogood (1844), 13 M. & W. 29; Sleddon *v.* Cruickshank (1846), 16 M. & W. 71; Cohen *v.* Foster (1892), 61 L. J. Q. B. 643; 66 L. T. 616; Vigers *v.* Sanderson, [1901] 1 K. B. 608; 70 L. J. K. B. 383.

Rules for ascertaining intention.

Sect. 18. "Unless a different intention appears, the following are rules for ascertaining the intention of the parties as to the time at which the property in the goods is to pass to the buyer:—

"Rule 1. Where there is an unconditional contract for the sale of specific goods in a deliverable state, the property in the goods passes to the buyer when the contract is made, and it is immaterial whether the time of payment or the time of delivery, or both, be postponed."

See Tarling *v.* Baxter, *supra;* Gilmour *v.* Supple (1858), 11 Moo. P. C. 551; and per Lord Blackburn in Seath *v.* Moore, *supra.*

"Rule 2. Where there is a contract for the sale of specific goods, and the seller is bound to do something to the goods, for the purpose of putting them into a deliverable state, the property does not pass until such thing be done, *and the buyer has notice thereof*" (*i*).

(*i*) The provision as to notice to the buyer of acts done by the seller to pass the property effects a change in the law, as this was not necessary prior to this Act. It should, however, be observed that the section does not provide that the seller shall *give* notice; so, the "notice" may mean either "notice" given by the seller or "knowledge" acquired by the buyer, or (probably) the "means of knowledge to which the buyer wilfully shuts his eyes."

As illustrating this rule, the following cases may be referred to, namely:—Acraman *v.* Morrice, *supra;* Rugg *v.* Minett (1809), 11 East, 210; 10 R. R. 475; Greaves *v.* Hepke (1818), 2 B. & A. 131; 20 R. R. 381; Woods *v.* Russell (1822), 5 B. & A. 942; 1 D. & R. 58; Swanwick *v.* Sothern (1839), 9 A. & E. 895; 1 P. & B. 648; Wood *v.* Bell (1856), 6 E. & B. 355; 25 L. J. Q. B. 321; Turley *v.* Bates (1863), 2 H. & C. 200; 33 L. J. Ex. 43.

"Rule 3. Where there is a contract for the sale of specific goods in a deliverable state, but the seller is bound to weigh, measure, test, or do some other act or thing with reference to the goods for the purpose of ascertaining the price, the property does not pass until such act or thing be done, *and the buyer has notice thereof*" (*j*).

See the following illustrations, namely:—Zagury *v.* Furnell (1809), 2 Camp. 240; 11 R. R. 704; Simmons *v.* Swift (1826), 5 B. & C. 857; 8 D. & R. 693; Tansley *v.* Turner (1835), 2 B. N. C. 151; 2 Scott, 238; Swanwick *v.* Sothern, *supra;* Kershaw *v.* Ogden (1865), 3 H. & C. 717; 34 L. J. Ex. 159.

"Rule 4. When goods are delivered to the buyer on approval or on 'sale or return,' or other similar terms (*k*), the property therein passes to the buyer:—

"(a) When he signifies his approval or acceptance to the seller, or does any other act adopting the transaction (*l*).

"(b) If he does not signify his approval or acceptance to the seller, but retains the goods without giving notice of rejection, then, if a time has been fixed for the return of the goods, on the expiration of such time, and, if no time has been fixed, on the expiration of a reasonable time. What is a reasonable time is a question of fact."

See the following illustrations, namely:—Ellis *v.* Mortimer (1805), 1 B. & P. N. R. 257; Swain *v.* Shepherd (1832), 1 M. & Rob. 223; Beverley *v.* Lincoln Gas Co. (1837), 6 A. & E. 829; 2 N. & P. 283; Head *v.* Tattersall (1871), L. R. 7 Ex. 7; 41 L. J. Ex. 4; *Ex parte* White (1879), L. R. 6 Ch. 397; 21 W. R. 465; Elphick *v.* Barnes

(*j*) See note (*i*), p. 330.

(*k*) It has recently been held that there is a custom in the fur trade that a person ordering furs on approval is liable for any loss (*e.g.*, by burglary) or injury occurring to the same while in his possession. Bevington *v.* Dale (1902), 7 Com. Cas. 112.

(*l*) The interpretation of this rule was considered in the recent case of Kirkham *v.* Attenborough, [1897] 1 Q. B. 201; 66 L. J. Q. B. 149, where goods delivered "on sale or return" had been pledged by the buyer, and the Court held that the pledging of the goods by him was an "act adopting the transaction" within the meaning of the rule, so as to pass the property in the goods to him, and consequently that the pledgee obtained a good title to the goods as against the seller.

(1880), 5 C. P. D. 321; 49 L. J. C. P. 698; *per cur.* in *Ex parte* Wingfield (1879), 10 Ch. D. 591; 40 L. T. 15.

"Rule 5.—(1.) Where there is a contract for the sale of unascertained or future goods by description, and goods of that description and in a deliverable state are unconditionally appropriated to the contract, either by the seller with the assent of the buyer, or by the buyer with the assent of the seller, the property in the goods thereupon passes to the buyer. Such assent may be express or implied, and may be given either before or after the appropriation is made.

"(2.) Where, in pursuance of the contract, the seller delivers the goods to the buyer or to a carrier or other bailee or custodier (whether named by the buyer or not) for the purpose of transmission to the buyer, and does not reserve the right of disposal, he is deemed to have unconditionally appropriated the goods to the contract."

Goods are in a "deliverable state" when they are in such a state that the buyer would, under the contract, be bound to take delivery of them. See sect. 62 (4).

As to part (1) of this rule, see Rohde *v.* Thwaites (1827), 6 B. & C. 388; 9 D. & R. 293; Elliot *v.* Pybus (1834), 10 Bing. 512; 4 M. & S. 389; Wilkins *v.* Bromhead (1844), 6 M. & G. 963; 13 L. J. C. P. 74; Godts *v.* Rose (1855), 17 C. B. 229; 25 L. J. C. P. 61; Jenner *v.* Smith (1869), L. R. 4 C. P. 270; Borrowman *v.* Free (1878), 4 Q. B. D. 500; 48 L. J. Q. B. 65; Konig *v.* Brandt (1901), 84 L. T. 748; 9 Asp. M. C. 199.

As to part (2) of the rule, reference may be made to Dutton *v.* Solomonson (1803), 3 B. & P. 582; 7 R. R. 883; Ogle *v.* Atkinson (1814), 5 Taunt. 759; 1 Marsh, 323; Fragano *v.* Long (1825), 4 B. & C. 219; 6 D. & R. 283; Dunlop *v.* Lambert (1839), 6 C. & F. 600; 49 R. R. 143; Aldridge *v.* Johnson (1857), 7 E. & B. 885; 26 L. J. Q. B. 296.

Reservation of right of disposal.

Sect. 19. "(1.) Where there is a contract for the sale of specific goods, or where goods are subsequently appropriated to the contract, the seller may, by the terms of the contract or appropriation, reserve the right of disposal of the goods until certain conditions are fulfilled. In such case, notwithstanding the delivery of the goods to the buyer, or to a carrier or other bailee or custodier for the purpose of transmission to the buyer, the property in the goods does not pass to the buyer until the conditions imposed by the seller are fulfilled.

"(2.) Where goods are shipped, and, by the bill of lading, the goods are deliverable to the order of the seller or his agent, the seller is *primâ facie* deemed to reserve the right of disposal.

"(3.) Where the seller of goods draws on the buyer for the price,

and transmits the bill of exchange and bill of lading to the buyer together to secure acceptance or payment of the bill of exchange, the buyer is bound to return the bill of lading if he does not honour the bill of exchange, and if he wrongfully retains the bill of lading the property in the goods does not pass to him" (*m*).

The following cases illustrate this section, namely: Jenkyns *v.* Brown (1849), 19 L. J. Q. B. 286; 14 Q. B. 496; Godts *v.* Rose (1855), 25 L. J. C. P. 61; 17 C. B. 229; Browne *v.* Hare (1858), 4 H. & N. 822: 29 L. J. Ex. 6; Joyce *v.* Swan (1864), 17 C. B. N. S. 84; Shepherd *v.* Harrison (1871), L. R. 5 H. L. 116; 40 L. J. Q. B. 148; *Ex parte* Banner (1876), 2 Ch. D. 278; 45 L. J. Bk. 73; Mirabita *v.* Imperial Ottoman Bank (1878), 3 Ex. D. 164; 47 L. J. Ex. 418; Cohen *v.* Foster (1892), 61 L. J. Q. B. 643; 66 L. T. 616.

Risk *prima facie* passes with property.

Sect. 20. "Unless otherwise agreed, the goods remain at the seller's risk until the property therein is transferred to the buyer, but when the property therein is transferred to the buyer, the goods are at the buyer's risk whether delivery has been made or not.

"Provided that where delivery has been delayed through the fault of either buyer or seller the goods are at the risk of the party in fault as regards any loss which might not have occurred but for such fault.

"Provided also, that nothing in this section shall affect the duties or liabilities of either seller or buyer as a bailee or custodier of the goods of the other party."

As illustrating this section, see Tarling *v.* Baxter, *supra;* Fragano *v.* Long (1825), 4 B. & C. 219; 6 D. & R. 283; Alexander *v.* Gardner (1835), 1 Scott, 281, 630; 1 B. N. C. 671; Bull *v.* Robison (1854), 10 Ex. 342; 24 L. J. Ex. 165; Castle *v.* Playford (1870), L. R. 7 Ex. 98; 41 L. J. Ex. 44; Martineau *v.* Kitching (1872), L. R. 7 Q. B. 436; 41 L. J. Q. B. 227; Calcutta Co. *v.* De Mattos (1863), 33 L. J. Q. B. 214.

Property without possession.

It is to be noted that, although the property in a chattel may be in the vendee, so as to make the loss fall on him if the thing were to perish, yet he may not be entitled to the possession. Thus, in the case quoted above of Clarke *v.* Spence, we have seen that the property in the materials passed to the purchaser as the building of the ship proceeded, but the builder, nevertheless, had a right to retain the fabric in order to complete it and earn the rest of the price. So, too, in a ready money sale the vendor has a lien for the

(*m*) But he can endorse the bill of lading to a third person so as to give such person a good title to the goods as against the seller. See the recent case of Cahn *v.* Pockett's Bristol Channel Steam Packet Co., [1899] 1 Q. B. 643; 68 L. J. Q. B. 515.

price. But, when goods are sold on credit, and nothing is said as to the time of delivery, the purchaser is entitled to immediate possession, both the right of property and the right of possession vesting in him at once.

A learned and exhaustive discussion of the numerous cases illustrating the above principles is contained in "Benjamin on Sale," see 4th edition, p. 277.

Stoppage in Transitu.

[83] LICKBARROW *v.* MASON. (1788)

[2 T. R. 63; 1 H. Bl. 357; 5 T. R. 683.]

Freeman, of Rotterdam, sent an order to Turings, of Middleburg, to ship a quantity of corn to Liverpool. Turings put the corn on board the ship "Endeavour," whereof the master was a Mr. Holmes. Holmes signed four bills of lading (usually, it may be remarked, only three are signed); and of the four one he retained, two were endorsed in blank by Turings and sent to Freeman with an invoice of the goods shipped, and the fourth was retained by Turings.

The sound ship "Endeavour" had not set sail very long when tidings came to the ears of the Turings that Freeman had become bankrupt. Rising to the occasion, they immediately sent off the bill of lading that remained in their custody to Mason & Co., of Liverpool, with a special endorsement to deliver the corn to them for Turings' benefit. Pursuant to this special indorsement, Holmes, when he arrived at Liverpool, delivered his cargo to the Masons. In the meantime, however, and before he became bankrupt, Freeman had sent his two bills of lading to

Messrs. Lickbarrow duly negotiated for a valuable consideration. Messrs. Lickbarrow, therefore, were anything but pleased to find that Mason & Co. had got hold of the corn, and they brought this action to try and make them give it up. In this they were successful. Judgment was given for the plaintiffs, on the ground that *a bonâ fide assignment of the bills of lading defeats the vendor's right to stop* in transitu.

Although the law relating to stoppage *in transitu* was codified by the Sale of Goods Act, 1893, the previous case law on the subject is useful to illustrate and explain the rules laid down in that Act.

The unpaid vendor of goods has a right, on the insolvency (*n*) of the vendee, to stop the goods and retake possession of them while on their way, and to retain them until payment or tender of the price (*o*). The right to stop is personal to the vendor (*p*); and cannot, for example, be exercised by a surety for the price of the goods (*q*). But, any time before the *transitus* is over, the vendor may ratify the act of a stranger who has stopped the goods (*r*); and a person who sends goods to be sold on the joint account of himself and his consignee may stop (*s*). The vendor may retake the goods, though he holds the consignee's acceptance, and without returning the bill (*t*). Who may stop.

It should be observed that there is a material distinction between an unpaid vendor's right over the goods in respect of his price and an ordinary *lien*. The latter cannot exist without both the right and the fact of possession, and is lost and cannot be resumed if the party claiming it abandon either the possession, or the right to possess the thing over which it is claimed: whereas "the vendor's right in respect of his price is not a mere lien which he will forfeit Distinction between vendor's right and the ordinary *lien*.

(*n*) "A person is deemed to be insolvent . . . who either has ceased to pay his debts in the ordinary course of business, or cannot pay them as they become due, whether he has committed an act of bankruptcy or not." Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 62 (3).

(*o*) *Ib.* s. 44.

(*p*) "The term 'seller' includes any person who is in the position of a seller, as, for instance, an agent of the seller to whom the bill of lading has been indorsed, or a consignor or agent who has himself paid, or is *directly* responsible for, the price." *Ib.* s. 38 (2).

(*q*) Siffken *v.* Wray (1805), 6 East, 371; 2 Smith, 480.

(*r*) Bird *v.* Brown (1850), 4 Ex. 786; 19 L. J. Ex. 154.

(*s*) Newsom *v.* Thornton (1805), 6 East, 17; 2 Smith, 207; and see Feise *v.* Wray (1802), 3 East, 93; 6 R. R. 551.

(*t*) Edwards *v.* Brewer (1837), 2 M. & W. 375; 6 L. J. Ex. 135.

if he parts with the possession, but grows out of his original ownership and dominion" (*u*).

In most stoppage *in transitu* cases the difficulty is to know whether the journey was at an end or not. The principle to be deduced from the cases is that the *transitus* is not at an end till the goods have reached the place named by the buyer to the seller as the place of their destination (*x*), even though the goods be carried in a ship *chartered by the buyer* (*y*). If, however, the ship is the *buyer's own*, the goods cannot generally be taken (*z*). Reference should be made to the case of Lyons *v.* Hoffnung (*a*), where it was held that where goods are intended by the purchaser to pass direct from the possession of the vendors into the possession of a carrier, to be carried to a destination contemplated at the time of purchase by both parties, and though held by the carrier as the purchaser's agent, they are still *in transitu* till the destination is reached, even although the delivery to the carrier has been made in such sense as to pass the property to the purchaser as owner. "The law appears," said Lord Herschell, "to be very clearly and accurately laid down by the Master of the Rolls in the case of Bethell *v.* Clark (*b*). He says, 'When the goods have not been delivered to the purchaser or to any agent of his to hold for him, otherwise than as a carrier, but are still in the hands of the carrier as such, and for the purposes of the transit, then, although such carrier was the purchaser's agent to accept delivery so as to pass the property, nevertheless the goods are *in transitu*, and may be stopped.'" And, though the goods remain in the hands of the carrier, the *transitus* may nevertheless be over; as, for instance, where the vendee pays the carrier a rent for warehousing (*c*), or where he has done something equivalent to taking possession (*d*), or where,

The transitus.

Purchaser's ship.

Lyons *v.* Hoffnung.

(*u*) See per Bayley, J., in Bloxam *v.* Sanders (1825), 4 B. & C. at p. 948; 7 D. & R. 396.

(*x*) Coates *v.* Railton (1827), 6 B. & C. 427; 9 D. & R. 593.

(*y*) Berndtson *v.* Strang (1867), L. R. 3 Ch. 588; 37 L. J. Ch. 665; *Ex parte* Rosevear China Clay Co., *Re* Cock (1879), 11 Ch. D. 560; 48 L. J. Bk. 100; Brindley *v.* Cilgwyn Slate Co. (1885), 55 L. J. Q. B. 67. See, however, Bethell *v.* Clark (1888), 20 Q. B. D. 615; 57 L. J. Q. B. 302; and sect. 45 (5) of the Sale of Goods Act, 1893.

(*z*) Schotsmans *v.* Lanc., &c. Ry. Co. (1867), L. R. 2 Ch. 332; 36 L. J. Ch. 361.

(*a*) (1890), 15 App. Cas. 391; 59 L. J. P. C. 79.

(*b*) *Supra.*

(*c*) Dixon *v.* Baldwen (1804), 5 East, 174; 7 R. R. 681; and see *Ex parte* Barrow (1877), 6 Ch. D. 783; 46 L. J. Bk. 71; Miles's case (1885), 15 Q. B. D. 39; 54 L. J. Q. B. 566.

(*d*) Ellis *v.* Hunt (1789), 3 T. R. 464; 1 R. R. 743; and see Foster *v.* Frampton (1826), 6 B. & C. 107; 2 C. & P. 469; and *Ex parte* Hughes (1893), 67 L. T. 598; 9 M. B. R. 294.

"after the arrival of the goods at the appointed destination, the carrier acknowledges to the buyer that he holds the goods on his behalf and continues in possession of them as bailee for the buyer, and it is immaterial that a further destination for the goods may have been indicated by the buyer" (*e*). And in the recent case of Taylor *v.* G. E. Ry. Co. (*f*), Bigham, J., held that the seller was not entitled to stop the goods as still being *in transitu*, where an agreement had been arrived at between the buyer of goods consigned by carrier to await his orders and the carrier, that the goods were to remain in the possession of the carrier as warehouse-keeper for the buyer. The *transitus*, however, is not determined by the goods arriving *at an intermediate stage*, unless they are to be thenceforward at the orders of the buyer and in the hands of persons who are to keep them for him (*g*). In Kendal *v.* Marshall (*h*), goods had been sent by an unpaid vendor through a carrier to a forwarding agent appointed by the purchaser, and who received his orders from the purchaser and not from the vendor; and it was held that the transit of the goods, upon reaching the hands of the forwarding agent, was at an end, and the right to stop *in transitu* lost, even although the goods might have been intended to be sent to an ulterior and subsequent destination. Bowen, L. J., said, in giving judgment in this case, "In Coates *v.* Railton, several cases were cited by Bayley, J., in the course of his judgment, and the principle to be deduced from them is, that where goods are sold to be sent to a particular destination, the *transitus* is not at an end until the goods have reached the place named by the vendee to the vendor as their destination. One exception, at least, is to be found in the principle here laid down: the vendee can always anticipate the place of destination, if he can succeed in getting the goods out of the hands of the carrier. In that case the transit is at an end, whatever may have been said as to the place of destination, and *this shows that the real test is not what is said, but what is done.*" The *vendee therefore may shorten the transitus* by going out to meet the goods, and taking them from the carrier; but a mere demand, even though backed by the production of a delivery order, will not be sufficient to defeat the right to stop (*i*). On the other hand, the

Arrival at intermediate station.

Vendee meeting goods.

(*e*) Sect. 45 (3) of the Sale of Goods Act, 1893.

(*f*) [1901] 1 K. B. 774; 70 L. J. K. B. 499.

(*g*) Smith *v.* Goss (1808), 1 Camp. 282; 10 R. R. 684; Mills *v.* Ball (1801), 2 B. & P. 457; 5 R. R. 653.

(*h*) (1883), 11 Q. B. D. 356; 52 L. J. Q. B. 313; and see Bethell *v.* Clark, *supra*.

(*i*) Whitehead *v.* Anderson (1842), 9 M. & W. 518; 11 L. J. Ex. 157; and see Coventry *v.* Gladstone (1868), L. R. 6 Eq. 41; 37 L. J. Ch. 492; and sect. 45 (2) of the Sale of Goods Act, 1893.

carrier may not prolong the transit so as to give the vendor an increased right of stoppage; and if the carrier wrongfully refuses to deliver the goods to the buyer the transit is deemed to be at an end (*k*).

How to stop.

To stop the goods, it is not necessary for the vendor to lay corporeal touch on them. It is sufficient if he gives *notice to those who have the immediate custody* of the goods; or, if to their employers, so that they may have reasonable time to communicate it to such persons in time to prevent a delivery to the buyer (*l*).

Stopping or delivering part.

The *stopping of part* of the goods consigned has *no effect on the remainder*, though the contract is entire (*m*). On the other hand, the *delivery of a part* of goods sold under one entire contract, if such delivery of part was made under such circumstances as to show an agreement to give up possession of the whole of the goods, *will defeat the right to stop* (*n*).

"If the goods are rejected by the buyer, and the carrier continues in possession of them, the transit is not deemed to be at an end, even if the seller has refused to receive them back" (*o*).

Assignment of bill of lading.

The most usual way, however, in which the vendor's right is defeated is by an absolute assignment of a bill of lading or other document of title to a *bonâ fide* assignee for a valuable consideration. An assignment, however, by the consignee of a document of title by way of pledge will not defeat the vendor's right, subject to the pledge (*p*). The effect on the vendor's right of stoppage *in transitu* of a sub-sale or pledge by the vendee is now regulated by the 47th section of the Sale of Goods Act, 1893, which is in the following terms, namely:—

Effect of sub-sale or pledge by buyer.

"Subject to the provisions of this Act, the unpaid seller's right of lien or retention or stoppage *in transitu* is not affected by any

(*k*) Sect. 45 (6) of the Sale of Goods Act, 1893; and Bird *v.* Brown (1850), 4 Ex. 786; 19 L. J. Ex. 154.

(*l*) Whitehead *v.* Anderson, *supra*. See also Phelps *v.* Comber (1885), 29 Ch. D. 813; 54 L. J. Ch. 1017; and sect. 46 of the Sale of Goods Act, 1893.

(*m*) Wentworth *v.* Outhwaite (1842), 10 M. & W. 436; 12 L. J. Ex. 172; and see Jones *v.* Jones (1841), 8 M. & W. 431; 10 L. J. Ex. 481.

(*n*) Slubey *v.* Heyward (1795), 2 H. Bl. 504; 3 R. R. 486; Crawshay *v.* Eades (1823), 1 B. & C. 181; 2 D. & R. 288; *Ex parte* Cooper, *In re* M'Laren (1879), 11 Ch. D. 68; 48 L. J. Bk. 49. Sect. 45 (7) of the Sale of Goods Act, 1893; and see per Lord Blackburn, in Kemp *v.* Falk (1882), 7 App. Cas. at p. 586; 52 L. J. Ch. 167.

(*o*) Sect. 45 (4) of the Sale of Goods Act, 1893; and see Bolton *v.* Lanc. & Yorks. Ry. Co. (1866), L. R. 1 C. P. 431; 35 L. J. C. P. 137.

(*p*) *In re* Westzinthus (1833), 5 B. & Ad. 817; 2 N. & M. 644; Spalding *v.* Ruding (1843), 6 Beav. 376; 12 L. J. Ch. 503; but see Leask *v.* Scott (1877), 2 Q. B. D. 376; 46 L. J. Q. B. 329.

sale, or other disposition of the goods which the buyer may have made unless the seller has assented thereto.

"Provided that where a document of title to goods has been lawfully transferred to any person as buyer or owner of the goods, and that person transfers the document to a person who takes the document in good faith and for valuable consideration, then, if such last-mentioned transfer was by way of sale, the unpaid seller's right of lien or retention or stoppage *in transitu* is defeated, and if such last-mentioned transfer was by way of pledge or other disposition for value, the unpaid seller's right of lien or retention or stoppage *in transitu* can only be exercised subject to the rights of the transferee" (*q*).

Effect of stopping. Rights of vendor after stoppage.

The effect of stoppage *in transitu* is not to rescind the contract, but to give the vendor a lien on the goods (*r*); and the goods, while detained, remain at the risk of the buyer. The vendor has no right at common law to resell them, at all events until the period of credit has expired; after that period, the refusal of the buyer to receive the goods *and* pay the price probably entitles the vendor to rescind the contract (*s*). And "where the goods are of a perishable nature, or where the unpaid seller gives notice to the buyer of his intention to resell, and the buyer does not within a reasonable time pay or tender the price, the unpaid seller may re-sell the goods and recover from the original buyer damages for any loss occasioned by his breach of contract" (*t*).

Bills of lading.

A case on bills of lading, which illustrates the inconvenience of the present system of having so many of them for the same lot of goods, is Glyn *v.* East and West India Dock Co. (*u*), an action for conversion against warehousemen who had, in a perfectly straightforward manner, delivered up some goods on the production of the second bill, contrary to the interests of the plaintiffs, who were indorsees for valuable consideration of the first. The defendants were held not guilty of conversion.

Sewell *v.* Burdick.

In Sewell *v.* Burdick (*x*), it was held that the mere indorsement and delivery of a bill of lading by way of pledge for a loan does not

(*q*) This section is fully discussed in their "Commentary on the Sale of Goods Act, 1893," by W. C. A. Ker & Pearson-Gee, pp. 255—263. The other sections of this Act, dealing with the subject of stoppage *in transitu*, are dealt with at length in that treatise. See also Cahn *v.* Pockett's Packet Co., [1899] 1 Q. B. 643; 68 L. J. Q. B. 515.

(*r*) Clay *v.* Harrison (1829), 10 B. & C. 99; 5 M. & R. 17; see sect. 48 of the Sale of Goods Act, 1893.

(*s*) See Langfort *v.* Tiler (1705), 1 Salk. 113; and Sm. L. C. p. 741 (11th ed.).

(*t*) Sale of Goods Act, s. 48 (3).

(*u*) (1882), 7 App. Cas. 591; 52 L. J. Q. B. 146.

(*x*) (1884), 10 App. Cas. 74; 54 L. J. Q. B. 156.

pass the property in the goods to the indorsee so as to transfer to him all liabilities in respect of the goods within the meaning of the Bills of Lading Act (18 & 19 Vict. c. 111), s. 1.

Goods privileged from Distress.

[84] SIMPSON *v.* HARTOPP. (1744)

[WILLES, 512.]

John Armstrong was a stocking-weaver of Leicester, and rented a small cottage of the defendant Hartopp. Early in 1741 he hired a stocking-frame from the plaintiff Simpson at a few shillings a week for the purposes of his trade. About the end of the year he got behindhand with his rent, and Hartopp distrained on him. There was not much for the bailiffs when they came; indeed, so little that there was not enough to satisfy the rent in arrear without carrying off Simpson's stocking-frame. This was done, although "the said John Armstrong's apprentice was then weaving a stocking on the said frame."

Simpson afterwards brought an action of trover for the stocking-frame, and succeeded in getting it restored to him; for a landlord has no right to distrain what is *actually in use*.

Landlord a favoured creditor.

If a tenant does not pay his rent according to his contract, his landlord has this advantage over other creditors, that, without having to seek the assistance of a Court of law, he may take possession of sufficient goods on the premises in the tenant's occupation to satisfy the debt. This summary and anomalous method of getting one's rights is called—not inappropriately, from the tenant's point of view—*distress*.

The general rule is that all personal chattels found on the demised premises can be distrained for rent. Simpson *v.* Hartopp introduces us to the exceptions to the rule. All goods found may be taken.

The exceptions may be divided into two classes— Two classes of things privileged.

1. Things *absolutely* privileged.
2. Things *conditionally* privileged.

1. Some things are *absolutely* privileged from distress; under no circumstances can they be taken. Such things are— (1.) Absolute privilege.

(1.) *Things in actual use.* Things in actual use.

Thus the exemption has been held to apply to a horse, while it is drawing a cart (*y*) or being ridden (*z*). The obvious reason why such things cannot be taken is that to try and do so *would probably lead to a breach of the peace.* Rather a nice point may some day arise as to whether *clothes merely taken off for natural repose* are "in actual use" or not (*a*). But such *actual use* must be shown as to make it appear probable that a distress would have led to a breach of the peace (*b*).

(2.) *Fixtures* Fixtures.

cannot be taken, because *damage would be done to the freehold* in tearing them away. A mere temporary removal of fixtures, however, for purposes of necessity will not destroy the privilege (*c*). Nor can keys, charters, &c. be taken (*d*).

At common law, cocks and sheaves of corn and other farm produce, and growing crops could not be distrained; but were absolutely privileged. By an Act of William and Mary (*e*), any person having rent in arrear and due upon any demise, lease, or contract, may seize and secure any sheaves or cocks of corn, or corn loose or in the straw, or hay lying or being in any barn or granary, or upon any hovel, stack, or rick, or otherwise upon any part of the land or ground charged with such rent, and lock up or detain the same in the place where the same shall be found, for, or in the nature of, a distress, until the same shall be replevied or sold; but the same must not be removed from such place to the damage of the Corn and growing crops.

(*y*) Field *v.* Adames (1840), 12 A. & E. 649.

(*z*) Storey *v.* Robinson (1795), 6 T. R. 138; 3 R. R. 137; Co. Litt. 47 a; Read *v.* Burley (1597), Cro. Eliz. 594.

(*a*) See Bissett *v.* Caldwell (1791), Peake, 50; 1 Esp. 206, n.; Baynes *v.* Smith (1794), 1 Esp. 206.

(*b*) Bunch *v.* Kensington (1841), 1 Q. B. 679; 10 L. J. Q. B. 203.

(*c*) Gorton *v.* Falkner (1792), 4 T. R. 565; 2 R. R. 463.

(*d*) Hellawell *v.* Eastwood (1851), 6 Ex. 295; 20 L. J. Ex. 154.

(*e*) 2 W. & M. sess. 1, c. 5, s. 3. A sale of goods distrained in pursuance of this Act must be a sale to a third party, and if the landlord purchase the goods himself the property in them does not pass to him: Moore *v.* Singer Manufacturing Co., [1903] 2 K. B. 168.

owner. This Act, however, did not give the landlord a right to distrain growing corn or crops, but an Act with that object was passed in George the Second's reign. 11 Geo. 2, c. 19, ss. 8 and 9, authorizes him to seize "*all sorts of corn and grass, hops, roots, fruits, pulse, or other products whatever, which shall be growing*" on any part of the estates demised or holden, "and the same to cut, gather, make, cure, carry, and lay up, *when ripe*, in the barns, or other proper place"—on the premises, if possible; if not, as near thereto as practicable. It is to be observed that this statute extends only to crops which become "ripe," and which when ripe are "laid up," and that they must not be taken before they are ripe.

Trees, shrubs, and plants.

In Clarke *v.* Gaskarth (*f*), it was held that young trees, shrubs, and plants growing in a nursery ground could not be distrained, as they were not *ejusdem generis* with the "products" specified in the 8th section of the Statute of George. Notice of the place where the distress is lodged is to be given to the tenant within a week of the lodgment.

The grantee of a rent charge cannot take growing crops under 11 Geo. 2, c. 19, but he can take hay or straw loose or in the stack (*g*).

Trade.

(3.) *Goods delivered to a person in the way of his trade* (*h*).

The ground of this exemption is public policy, which requires that no unnecessary impediments shall be thrown in the way of trade and commerce. The trade, however, must be a "public" trade, that is, one carried on *generally* for the benefit of any persons who choose to avail themselves of it, as distinguished from a special employment by one or particular individuals. The trade need not be public in the sense that all the King's subjects have a right to insist on the trader accepting their goods (*i*). But an artist to whom a picture is delivered to alter is not therein a public trader (*k*).

"Under this head are included corn sent to a miller to be ground (*l*); a horse sent to a farrier's to be shod (*m*); materials sent

(*f*) (1818), 8 Taunt. 431; 2 Moore, 491.

(*g*) See Johnson *v.* Faulkner (1842), 2 Q. B. 925; 5 G. & D. 184; Miller *v.* Green (1831), 2 Cr. & J. 143; 8 Bing. 92; and 4 Geo. 2, c. 28, s. 5.

(*h*) See Clarke *v.* Millwall Dock Co. (1886), 17 Q. B. D. 494; 55 L. J. Q. B. 378, where a ship while building was held liable to be distrained by the shipbuilder's landlord though belonging to a third person, because the *privilege depends on the actual delivery to the tenant by the owner of the goods.*

(*i*) Muspratt *v.* Gregory (1836), 1 M. & W., per Parke, B., at p. 653; 6 L. J. Ex. 34; and see Gibson *v.* Ireson (1842), 3 Q. B. pp. 44, 46.

(*k*) Von Knoop *v.* Moss (1891), 7 T. L. R. 500.

(*l*) Co. Litt. 47 a.

(*m*) Year Book, 22 Ed. 4, fol. 49 b.

to a manufacturer to be worked up (*n*), including the case of material delivered to a weaver to be manufactured at his own home (*o*); beasts sent to a butcher to be slaughtered (*p*); goods deposited for the purpose of sale with a factor (*q*), a commission agent (*r*), or auctioneer (*s*); or placed for safe custody in the warehouse of a wharfinger (*t*); or pledged with a pawnbroker (*u*); and goods delivered to a carrier to be conveyed by him to some place, whether he is strictly a common carrier or no, provided he carries the goods of all persons indifferently" (*x*).

But the goods must be *on the premises* of the person exercising the trade, or they will not be privileged (*y*). Thus, if you entrust a horse to an innkeeper, so long as it remains on the inn premises, the innkeeper's landlord cannot touch it; but if the innkeeper removes it to a friend's stable half a mile off, it is not privileged as against that person's landlord (*z*).

Cattle in or on the way to market.

The necessities of commerce account also for the protection of cattle in (*a*) or going to a fair or market (*b*). If the distance is great enough to require a night's rest, they cannot be distrained by the landlord of a field into which they are put to graze for the night (*b*).

The Agricultural Holdings Act, 1883 (*c*), on the holdings to which that Act applies, gives absolute protection against distress for rent to "agricultural or other machinery which is the *bonâ fide* property of a person other than the tenant, and is on the premises of the tenant under a *bonâ fide* agreement with him for the hire or use thereof in the conduct of his business, and live stock of all kinds which is the *bonâ fide* property of a person other than the tenant, and is on the premises of the tenant solely for breeding purposes."

(*n*) Gibson *v.* Ireson, *supra*; Read *v.* Burley (1597), Cro. Eliz. 549.

(*o*) Wood *v.* Clarke (1831), 1 Cr. & J. 484; 9 L. J. Ex. 187.

(*p*) Brown *v.* Shevill (1834), 2 A. & E. 138; 4 L. J. (N. S.) K. B. 50.

(*q*) Gilman *v.* Elton (1821), 3 Br. & B. 75; 6 Moore, 243; Mathias *v.* Mesnard (1826), 2 C. & P. 353.

(*r*) Findon *v.* M'Laren (1845), 6 Q. B. 891; 14 L. J. Q. B. 183.

(*s*) Adams *v.* Grane (1833), 1 Cr. & M. 380; 2 L. J. (N. S.) Ex. 105.

(*t*) Thompson *v.* Mashiter (1823), 1 Bing. 283; 1 L. J. C. P. 104.

(*u*) Swire *v.* Leach (1865), 18 C. B. N. S. 479; 34 L. J. C. P. 150.

(*x*) Gisbourn *v.* Hurst (1710), 1 Salk. 249; Fawcett's Landlord and Tenant, p. 231 (2nd ed.).

(*y*) Lyons *v.* Elliott (1876), 1 Q. B. D. 210; 45 L. J. Q. B. 159; and see Tapling *v.* Weston (1883), 1 C. & E. 99.

(*z*) Crosier *v.* Tomkinson (1759), 2 Ld. Ken. 439.

(*a*) Co. Litt. 47 a.

(*b*) Tate *v.* Gleed (1784), 2 Wms. Saund. 675, note (*x*) (ed. 1871); Nugent *v.* Kirwan (1838), 1 Jebb & Sy. 97; Lyons *v.* Elliott (1876), 1 Q. B. D. 214; 45 L. J. Q. B. 159.

(*c*) 46 & 47 Vict. c. 61, s. 45.

Perishable goods.

(4.) *Perishable goods* cannot (unless by statute) be taken, because they cannot be restored in the same plight, and at common law a distress is a mere pledge. Thus the flesh of animals lately slaughtered cannot be distrained (*d*). Nor can money unless in a bag, so that the same identical coins may be recovered (*e*).

Wild animals.

(5.) *Animals ferœ naturæ;* because no one has any valuable property in them. But *animals ferœ naturæ* in a state of confinement and civilization (*e.g.*, dogs, deer in a park, birds in cages, &c.) are distrainable (*f*).

Goods in custody of law.

(6.) *Goods in the custody of the law.*

Thus, goods which have been distrained *damage feasant*, or taken in execution, are not distrainable (*g*). And goods are deemed to be still in the custody of the law until they are ready for removal, and the purchaser from the sheriff has had a reasonable time to remove them (*h*). But fraudulent and irregular executions will not prevent a distress (*i*), and it has been held that the exemption does not extend to goods in the custody of a messenger under a fiat in bankruptcy (*k*), or a receiver appointed by the Court, but the leave of the Court should be obtained (*l*). But where a mortgagee has appointed a receiver under sect. 19 of the Conveyancing Act, 1881, the mortgagor cannot distrain for arrears of rent, except by the authority of the receiver, who is the only person who can levy a valid distress (*m*). Moreover, by 14 & 15 Vict. c. 25, s. 2 (which was passed in order to reverse the law as laid down in Wharton *v.* Naylor (*n*)), growing crops seized and sold by the sheriff under an execution are liable, so long as they remain on the land, to be distrained for the rent which becomes due after the seizure and sale, if there is no other sufficient distress. See also 56 Geo. 3, c. 50.

Ambassadors.

(7.) *The goods of an ambassador, or his servants* (*o*).

(*d*) Morley *v.* Pincombe (1848), 2 Ex. 101; 18 L. J. Ex. 272.

(*e*) 1 Roll. Abr. 667; 2 Bac. Abr. 109.

(*f*) Davies *v.* Powell (1737), Willes, 46; Morgan *v.* Abergavenny (1849), 8 C. B. 768; Ford *v.* Tynte (1862), 31 L. J. Ch. 177; and see Reg. *v.* Shickle (1868), L. R. 1 C. C. R. 158; 38 L. J. M. C. 21.

(*g*) Peacock *v.* Purvis (1820), 2 Bro. & B. 362; 5 Moore, 79.

(*h*) Wharton *v.* Naylor (1848), 12 Q. B. 673; 17 L. J. Q. B. 278; *Re* Benn Davis (1885), 55 L. J. Q. B. 217; 54 L. T. 304.

(*i*) Blades *v.* Arundale (1813), 1 M. & S. 711; 14 R. R. 555.

(*k*) Briggs *v.* Sowry (1841), 8 M. & W. 729.

(*l*) *Re* Sutton (1863), 32 L. J. Ch. 437; 8 L. T. 343; and see *Re* Till (1873), 16 Eq. 97; 42 L. J. Bk. 84.

(*m*) Woolston *v.* Ross, [1900] 1 Ch. 788; 69 L. J. Ch. 363.

(*n*) (1848), 12 Q. B. 673; 17 L. J. Q. B. 278.

(*o*) 7 Ann. c. 12, s. 3. Macartney *v.* Garbutt (1890), 24 Q. B. D. 368; 62 L. T. 656. But the privilege only covers goods upon premises occupied for purposes of the em-

(8.) *The goods of a lodger,* Lodgers.

by virtue of the Lodgers' Goods Protection Act, 1871 (*p*). The Act does not define a "lodger," and the omission has led to a good deal of litigation (*q*), to which it is not necessary to refer in detail. If the lodger's things have been seized, he must write out a declaration and an inventory, and serve the landlord with the document (*r*). If he does that in the proper way, complying faithfully with the requirements of the Act, he will get his things back. See, however, Thwaites *v.* Wilding (*s*), where Bowen, L. J., said, "I think it clear that a lodger is relieved only when the terms of the Lodgers' Goods Protection Act have been rigidly complied with. A lodger must make a fresh declaration each time that a distress is levied on his goods. A declaration made at the time of levying one distress will not protect him against a second and subsequent distress. The statute is not for the benefit of the lodger alone; the superior landlord is to enjoy a correlative benefit; he is to receive in part discharge of his claim payment of any rent which may be due from the lodger to his immediate landlord. The declaration required from the lodger must state that the goods seized are his, and whether any and what rent is due from him. The property in the goods seized may vary from time to time, and the state of account between the lodger and his immediate landlord may vary in like manner. . . . . When a fresh distress is levied, it must be met by a fresh declaration."

(9.) *Frames, looms, &c., used in the woollen, cotton, or silk manufactures* (*t*). Looms.

(10.) *Gas meters and fittings belonging to a gas company incorporated by Act of Parliament* (*u*). Gas meters.

(11.) *Railway rolling stock in any works not belonging to the tenant of the works* (*x*). Railway rolling stock.

(12.) *Meters and pipes the property of a waterworks company which are used for the supply of water to a house* (*y*).

bassy; Novello *v.* Toogood (1823), 1 B. & C. 554; 1 L. J. K. B. 181.

(*p*) 34 & 35 Vict. c. 79.

(*q*) See Morton *v.* Palmer (1881), 51 L. J. Q. B. 7; 45 L. T. 426; Ness *v.* Stephenson (1882), 9 Q. B. D. 245; 47 J. P. 134; Heawood *v.* Bone (1884), 13 Q. B. D. 179; 51 L. T. 125; Phillips *v.* Henson (1877), 3 C. P. D. 26; 47 L. J. C. P. 273.

(*r*) A form of declaration is given in Fawcett's Landlord and Tenant, p. 243 (*b*) (2nd ed.).

(*s*) (1883), 12 Q. B. D. 4; 53 L. J. Q. B. 1; but see *Ex parte* Harris (1885), 16 Q. B. D. 130; 55 L. J. M. C. 24; where it was held that, if no rent was due from a lodger, the declaration need not state the fact, nor need it state that the declarant was a lodger.

(*t*) 6 & 7 Vict. c. 40, ss. 18 and 19.

(*u*) Gasworks Clauses Act, 1847 (10 Vict. c. 15), s. 14.

(*x*) 35 & 36 Vict. c. 50, s. 3.

(*y*) Waterworks Clauses Act, 1847 (10 & 11 Vict. c. 17).

(13.) Electric lighting apparatus (*z*).

(14.) Section 4 of the Law of Distress Amendment Act, 1888 (*a*), exempts from distress the *wearing apparel and bedding* (*b*) of the tenant or his family, and the *tools and implements of his trade* (*c*) *to the value of* £5.

Tadman *v.* Henman.

Reference may here be made to the novel point decided in the case of Tadman *v.* Henman (*d*), where it was held that a person who lets premises to which he has no title, cannot distrain for arrears of rent due from the tenant the goods of a third person which happen to have been brought on to the premises by the tenant's licence; the reason being that, although a tenant is estopped from disputing his lessor's title, third persons, not claiming possession under the tenant, are not so estopped.

(2.) Conditional privilege.

2. Certain other things are privileged *conditionally*. They can be taken, but only when there are not sufficient other goods on the premises to satisfy the landlord's claim. Such things are—

Tools.

(1.) *Tools of trade;*

e.g., a navvy's pickaxe, a doctor's stethoscope, a stocking-weaver's frame, or a lawyer's "Leading Cases." It would be contrary to public policy to take the means whereby a man lives (*e*). (Of course, if the lawyer were actually reading his law-book, or the doctor using his surgical instrument, such things would be *absolutely* privileged as being *in actual use*.)

Ledgers, day-books, vouchers, and other business papers are not distrainable (*f*).

Beasts.

(2.) *Beasts of the plough and sheep* (*g*).

But colts, steers, and heifers are not privileged (*h*); and beasts of the plough may be distrained if the only other subject of distress is growing crops (*i*). Moreover, beasts of the plough can be distrained *for poor-rates*, whether there are other things on the premises or not (*k*).

Agricultural

The 45th section of the Agricultural Holdings Act, 1883 (*l*), pro-

(*z*) Electric Lighting Act, 1882 (45 & 48 Vict. c. 56).

(*a*) 51 & 52 Vict. c. 21.

(*b*) "Bedding" includes "bedstead." Davis *v.* Harris, [1900] 1 Q. B. 729; 69 L. J. Q. B. 232.

(*c*) As to sewing-machine, see Churchward *v.* Johnson (1889), 54 J. P. 326; and Masters *v.* Fraser (1902), 85 L. T. 611; 66 J. P. 100.

(*d*) [1893] 2 Q. B. 168; 57 J. P. 664.

(*e*) Gorton *v.* Falkner (1792), 4 T. R. 565; 2 R. R. 463.

(*f*) Woodf. Landl. & Ten. p. 470 (14th ed.).

(*g*) See 51 Hen. 3, stat. 4.

(*h*) Keen *v.* Priest (1859), 4 H. & N. 236; 28 L. J. Ex. 157.

(*i*) Piggott *v.* Birtles (1836), 1 M. & W. 441; 2 Gale, 18.

(*k*) Hutchins *v.* Chambers (1758), 1 Burr. 579; 2 Ld. Ken. 204.

(*l*) 46 & 47 Vict. c. 61. It should be noted that sects. 49—52 of this Act were repealed by the Law of Distress Amendment Act, 1888 (51 & 52 Vict. c. 21), s. 8.

tects the live stock of a third person brought on to a holding to which the Act applies to be fed at a fair price, provided that there is other sufficient distress which can be taken. The "fair price" need not be in money. In the London and Yorkshire Bank *v.* Belton (*m*) cows were agisted on the terms "milk for meat,"—*i.e.*, that the agister should take their milk in exchange for their pasturage—and it was held that the agistment was within the Act. "The question is," said Lord Coleridge, C. J., "what is the meaning of the words 'fair price.' Putting aside pedantic and scholastic refinements and derivations, 'price' in ordinary colloquial language does not always mean money, and 'fair price' does not always mean 'coin of the realm.' We say that a man got something and paid a fair price for it without meaning that he paid so many pounds, shillings and pence, but meaning only that he paid a fair equivalent, for what he got." "I cannot gather from the section," said Mathew, J., "the slightest hint of an intention in the legislature to confine the provision to cases where contracts of agistment shall be for money and money only."

Holdings Act, 1883.

"Milk for meat."

The effect of taking privileged goods is to make the distraining landlord a trespasser *ab initio*. But where *part only* of the goods distrained are privileged, he is a trespasser *ab initio* in respect of that part only (*n*). *Double the value* of goods distrained and sold where no rent is due may be recovered by the owner of the goods (*o*).

Trespass *ab initio*.

It is provided by statute, 2 Will. & M. c. 5, s. 4, that upon any pound breach or rescous of goods distrained for rent, the person grieved thereby shall in a special action upon the case recover *treble damages* and costs against the offender. By 5 & 6 Vict. c. 97, that part of this section which relates to treble *costs* is repealed, but that relating to treble *damages* is still left in force. And it has recently been held (*p*) that an action is maintainable by the landlord under this section without proof of any special damage suffered by him.

Damages for pound breach or rescous of goods.

Generally, a distress cannot be levied elsewhere than on the tenant's premises (*q*). But if, while his rent is in arrear, he "fraudulently or clandestinely" (*r*) removes his goods, to prevent

Fraudulent removal of goods.

(*m*) (1885), 15 Q. B. D. 457; 54 L. J. Q. B. 568.

(*n*) Harvey *v.* Pocock (1843), 11 M. & W. 740; 12 L. J. Ex. 434.

(*o*) 2 Will. & M. c. 5, s. 4.

(*p*) Kemp *v.* Christmas (1898), 79 L. T. 233.

(*q*) Buszard *v.* Capel (1828), 8 B. & C. 141; 6 Bing. 150; but see Gillingham *v.* Gwyer (1867), 16 L. T. 640.

(*r*) The word connecting these adverbs being "or," not "and," it has been held that a landlord is justified under the statute in following goods removed without the

a distress, his landlord may, within thirty days after such removal, follow and take them from the place to which they have been removed (*s*). If, however, before getting at them, the goods have been sold to a *bonâ fide* purchaser for valuable consideration, he will be too late (*t*). In Gray *v.* Stait (*u*), it was held that a landlord could not follow and distrain his tenant's goods which had been fraudulently removed to prevent a distress for rent due, if at the time of the distress the tenant's interest in the demised premises had come to an end and he was no longer in possession. "The statute 11 Geo. 2, c. 19, s. 1," said Bowen, L. J., "allows a distress upon goods fraudulently removed, only where a distress could have been lawfully made if they had remained upon the demised premises. The argument for the defendants is not assisted by the provisions of 8 Anne, c. 14, ss. 6, 7 (*x*); these enactments merely provide that the goods of the tenant may be distrained after the expiration of the tenancy whilst he remains in possession."

Where goods distrained for rent by a landlord have been impounded on the premises under 11 Geo. 2, c. 19, s. 10, it is not requisite that any one on the landlord's behalf should be left in possession of the goods (*y*).

Waiver or postponement of right of distress.

It may be observed that a landlord's right of distress may be waived or postponed by agreement with the tenant; and it has been held that the mere fact that a bill of exchange is given by a tenant to his landlord in respect of rent due is, at least, some evidence of an agreement by the landlord to suspend his right of distress until the bill should have matured (*z*).

Although a lease is not determined at law by a contract by the lessee to purchase the reversion, still in equity the landlord's right to distrain is suspended pending completion of the contract; but if the contract is released or abandoned, or the lessee by unreasonable delay loses his right to specific performance, the landlord may then distrain (*a*).

Distress Amend-

The Law of Distress Amendment Act, 1888 (51 & 52 Vict. c. 21),

slightest attempt at concealment. Opperman *v.* Smith (1824), 4 Dowl. & R. 33; 2 L. J. K. B. 108.

(*s*) 11 Geo. 2, c. 19.

(*t*) Sect. 2. But under sect. 3, the landlord may recover double the value of the goods. See the recent cases of Tomlinson *v.* Consolidated, &c. Corporation (1890), 24 Q. B. D. 135; 62 L. T. 162; Hobbs *v.* Hudson (1890), 25 Q. B. D. 232; 59 L. J. Q. B. 562.

(*u*) (1883), 11 Q. B. D. 668; 52 L. J. Q. B. 412.

(*x*) As to the effect of this Act, see Wilkinson *v.* Peel, [1895] 1 Q. B. 516; 64 L. J. Q. B. 178; distinguishing Nuttall *v.* Staunton (1825), 4 B. & C. 51; 3 L. J. K. B. 135.

(*y*) Jones *v.* Biernstein, [1900] 1 Q. B. 100; 69 L. J. Q. B. 1.

(*z*) Palmer *v.* Bramley, [1895] 2 Q. B. 405; 65 L. J. Q. B. 42.

(*a*) See Ellis *v.* Wright (1897), 76 L. T. 522.

provides that no person shall act as bailiff to levy any distress for rent, unless authorized to act as a bailiff by a certificate of a county court judge, and any person not holding such a certificate who levies a distress is deemed to be a trespasser (*b*). The goods distrained cannot be sold until the expiration of fifteen days from their seizure, provided the tenant so require in writing, and give security for any additional costs thereby incurred. ment Act, 1888.

The costs of distress are regulated and restricted by the Distress for Rent Rules, 1888.

Reference should also be made to section 160 of the County Courts Act, 1888 (51 & 52 Vict. c. 43), which provides that when goods in a tenement for which rent is due are taken in execution under the warrant of a county court, the landlord may claim the rent due to him by delivering a notice in writing signed by himself or his agent, stating the amount of rent claimed to be in arrear, and the time for and in respect of which such rent is due, to the bailiff making the levy, and such bailiff shall, in making the levy, in addition thereto distrain for the rent so claimed (*c*). Such claim, however, must be made within five clear days from the date of such taking, or before the removal of the goods, and is only available for four weeks' rent where the tenement is let by the week, or for two terms of payment where the letting is for any other term less than a year, or one year's rent in any other case. County Courts Act, 1888, s. 160.

Agricultural Fixtures, &c.

ELWES *v.* MAW. (1802) [85]

[3 East, 38; 6 R. R. 523.]

The question in this case was whether the tenant of a farm in Lincolnshire was entitled, at the expiration of his lease, to demolish and cart away a beast house, a car-

(*b*) See Hogarth *v.* Jennings, [1892] 1 Q. B. 907; 61 L. J. Q. B. 601; and the Law of Distress Amendment Act, 1895 (58 & 59 Vict. c. 24).

(*c*) See Hughes *v.* Smallwood (1890), 25 Q. B. D. 306; 59 L. J. Q. B. 503.

penter's house, a pigeon house, and other fixtures he had put up. It was held that he could not do this, and that they became the landlord's.

Fixtures.

The two principles, that when an object is so attached to the house as to become part thereof, it goes to the heir, and that when, from its nature and purpose, it is clearly not intended to form part of the realty, but is only attached thereto for the purpose of enjoyment during the occupancy of its owner, it is removable and goes to the executor, have been established from the earliest times and are still in force. These principles govern all cases of fixtures, whether between landlord and tenant or tenant for life and remainderman, and any apparent change in the law is not in the principles themselves, but arises from their application under altered conditions of life and habits (*d*). To determine whether or not an object has become part of the freehold, regard must be had to all the circumstances of the particular case—to the taste and fashion of the day as well as to the position in regard to the freehold of the person who is supposed to have made that which was once a mere chattel part of the realty; the *mode of annexation is only one of the circumstances of the case*, and not always the most important, and its relative importance is probably not what it was in ruder or simpler times (*e*). Thus, where the mortgagor of a freehold dwelling-house, after the execution of the mortgage, removed certain fixed grates from the house, and substituted for them an equal number of dog-grates, which were not physically attached to the freehold, but rested in their place merely by their own weight, it was held that, the true inference being that the dog-grates were substituted for the purpose of improving the inheritance, they were fixtures (*f*).

Agriculture.

The Agricultural Holdings Act of 1883 (*g*) has considerably extended the rights of agricultural tenants to remove fixtures. The 34th section of that Act is as follows:—

"Where after the commencement of this Act a tenant affixes to

(*d*) Leigh *v.* Taylor, [1902] A. C. 157; 71 L. J. Ch. 272; affirming the decision of the Court of Appeal reported *sub nom. In re* De Falbe, Ward *v.* Taylor, [1901] 1 Ch. 523; 70 L. J. Ch. 286; where it was held that tapestries affixed by means of nails and moulding to walls by a tenant for life, which were removable, and had in fact been removed without damage to the structure, belonged to the tenant for life, who erected them, and were removable by his executors after his death. See the earlier cases of D'Eyncourt *v.* Gregory (1866), L. R. 3 Eq. 382; 36 L. J. Ch. 107; and Norton *v.* Dashwood, [1896] 2 Ch. 497; 65 L. J. Ch. 737.

(*e*) *Ibid.*, per Lord Macnaghten.

(*f*) Monti *v.* Barnes, [1901] 1 K. B. 205; 70 L. J. K. B. 225.

(*g*) 46 & 47 Vict. c. 61.

his holding any engine, machinery, fencing, or other fixture, or erects any building for which he is not under this Act or otherwise entitled to compensation, and which is not so affixed or erected in pursuance of some obligation in that behalf or instead of some fixture or building belonging to the landlord, then such fixture or building shall be the property of and be removable by the tenant before or within a reasonable time after the termination of the tenancy.

"Provided as follows:—

"(1.) Before the removal of any fixture or building, the tenant shall pay all rent owing by him, and shall perform or satisfy all other his obligations to the landlord in respect of the holding.

"(2.) In the removal of any fixture or building, the tenant shall not do any avoidable damage to any other building or other part of the holding.

"(3.) Immediately after the removal of any fixture or building the tenant shall make good all damage occasioned to any other building or other part of the holding by the removal.

"(4.) The tenant shall not remove any fixture or building without giving one month's previous notice in writing to the landlord of the intention of the tenant to remove it.

"(5.) At any time before the expiration of the notice of removal, the landlord, by notice in writing given by him to the tenant, may elect to purchase any fixture or building comprised in the notice of removal, and any fixture or building thus elected to be purchased shall be left by the tenant, and shall become the property of the landlord, who shall pay the tenant the fair value thereof to an incoming tenant of the holding; and any difference as to the value shall be settled by a reference under this Act, as in case of compensation (but without appeal)."

Market gardens.

And the Market Gardeners' Compensation Act, 1895 (*h*), extended the provisions of the above section to market gardens.

Trade, ornamental, or domestic fixtures may gene-

Fixtures erected for purposes of *trade*, *ornament*, *or domestic use* may, as a rule, be freely removed by the tenant, *provided they can be removed without material injury to the freehold* (*i*). Thus, the tenant can remove machinery and utensils of a chattel nature,

(*h*) 58 & 59 Vict. c. 27. See Smith *v.* Callander, [1901] A. C. 297; 70 L. J. P. C. 53; Mears *v.* Callander, [1901] 2 Ch. 388; 70 L. J. Ch. 621.

(*i*) Trappes *v.* Harter (1833), 3 Tyr. 604; 2 Cr. & M. 181; Martin *v.* Roe (1857), 26 L. J. K. B. 129; 7 E. & B. 244; Gibson *v.* Hammersmith Ry. Co. (1862), 2 Dr. & Sm. 608; 32 L. J. Ch. 337; and Wake *v.* Hall (1883), 8 App. Cas. 205; 52 L. J. Q. B. 494.

rally be removed.

such as salt-pans (*k*), vats, &c. for soap-boiling (*l*), engines for working collieries (*m*), or other trade purposes (*n*), and also buildings of a slight description, such as a varnish-house (*o*), or a Dutch barn set up for trading purposes (*p*). The right of removal exists where the things can be taken away bodily, or if, by reason of their bulk and complexity, it should be necessary to take them to pieces, they can be put together in the same form in some other place (*q*). As to glass-houses, shrubs, box-borders, &c., an ordinary tenant cannot remove such things, but a nurseryman may (*r*). It has been held that a collection of stuffed birds in cases fixed to the walls may be removed (*s*). As regards articles of domestic utility it has been held that a tenant may remove stoves and grates (*t*); beds fastened to the wall or ceiling (*u*); kitchen ranges, ovens and coppers (*x*); pumps (*y*); bells (*z*); and cupboards (*a*). "The tests whether an article falls under the present class seem to be (1) that it is an article of domestic convenience, (2) that it is slightly affixed, and (3) that it can be moved entire" (*b*).

Fixtures must be removed during tenancy.

On the whole, then, as between landlord and tenant, the maxim "*quicquid plantatur solo, solo cedit*" has lost much of its pristine force and application. But the tenant must take care to remove his fixtures *during the tenancy* (*c*), even though the lease determines

(*k*) Lawton *v.* Salmon (1782), 1 H. Bl. 259, note (*a*); 2 R. R. 764.

(*l*) Poole's Case (1704), 1 Salk. 368.

(*m*) Lawton *v.* Lawton (1743), 3 Atk. 13; Dudley *v.* Warde (1751), Ambl. 113; Ward *v.* Dudley (1887), 57 L. T. 20.

(*n*) Climie *v.* Wood (1869), L. R. 4 Ex. 328; 38 L. J. Ex. 223.

(*o*) Penton *v.* Robart (1801), 2 East, 88; 4 Esp. 33.

(*p*) Dean *v.* Allaley (1799), 3 Esp. 11. See Fitzherbert *v.* Shaw (1789), 1 H. Bl. 258.

(*q*) Whitehead *v.* Bennett (1858), 27 L. J. Ch. 474; 6 W. R. 351.

(*r*) Empson *v.* Soden (1833), 4 B. & Ad. 655; 1 N. & M. 720; Penton *v.* Robart (1801), 2 East, 88; 4 Esp. 33; Buckland *v.* Butterfield (1820), 2 Bro. & B. 54; 4 Moore, 440; and Mears *v.* Callander, [1901] 2 Ch. 388; 70 L. J. Ch. 621.

(*s*) Hill *v.* Bullock, [1897] 2 Ch. 482; 66 L. J. Ch. 705. As regards tapestries, see Leigh *v.* Taylor, *supra*.

(*t*) Grymes *v.* Boweren (1830), 6 Bing. 437; 8 L. J. O. S. C. P. 140; R. *v.* Dunstan (1825), 4 B. & C. 686; *Ex parte* Barclay (1855), 5 D. M. & G. 410; 25 L. J. Bk. 1; R. *v.* Lee (1866), L. R. 1 Q. B. 254; 35 L. J. M. C. 105.

(*u*) *Ex parte* Quincy (1750), 1 Atk. 478.

(*x*) Lawton *v.* Lawton (1743), 3 Atk. 15. See Winn *v.* Ingilby (1822), 5 B. & A. 625; 1 D. & R. 247; Darby *v.* Harris (1841), 1 Q. B. 895; 10 L. J. Q. B. 294.

(*y*) Grymes *v.* Boweren, *supra*.

(*z*) Lyde *v.* Russell (1830), 1 B. & Ad. 394; 9 L. J. K. B. 26. See Pugh *v.* Arton (1869), L. R. 8 Eq. 626; 38 L. J. Ch. 619.

(*a*) R. *v.* Dunstan, *supra*; *Ex parte* Barclay, *supra*.

(*b*) See Fawcett's Landlord and Tenant, p. 491 (2nd ed.); and Amos & Ferard on Fixtures, p. 411 (3rd ed.).

(*c*) Lyde *v.* Russell (1830), 1 B. & Ad. 394; 9 L. J. K. B. 26.

by forfeiture and not by effluxion of time (*d*); otherwise, the law will presume that he intended to make a present of them to his landlord. And if a tenant wrongfully holds over after the termination of his tenancy, he cannot then remove his fixtures (*e*).

Thomas *v.* Jennings.

An important case on this subject is Thomas *v.* Jennings (*f*), which shows how strictly the rule is enforced that fixtures must be removed, if at all, *during* the tenancy. It was decided that the rule applies, even though the fixtures remain on the premises by the parol consent of the lessor; and though such consent might give the tenant a right of action for the value of the fixtures against the lessor if he subsequently refused to permit their removal, it would give no such right as against the lessor's mortgagees who were no parties to it, should they refuse.

Heir and executor.

As between heir and executor, the law is that the house or land cannot be ruthlessly stripped of fixtures which add materially to its enjoyment. But exceptions to the rule exist in the case of trade fixtures (*g*), and generally of those fixtures put up for ornament or convenience which can be removed without disfiguring the house (*h*).

Vendor and vendee.

As between vendor and vendee, a sale of the freehold carries with it the fixtures, unless there is an express provision to the contrary (*i*).

Outgoing and incoming tenant.

As between outgoing and incoming tenant, there is generally an agreement by the latter (which need not be in writing) (*k*) to take the fixtures at a valuation. To this agreement it is desirable that the landlord should be a party; otherwise he might say that the outgoing tenant had forfeited them to him by not removing them, and so the incoming tenant would not be able to remove them at the end of his term.

As to the tenant's rights to remove fixtures where the demised premises are mortgaged, see *ante*, p. 98.

What is a fixture.

The following definition of a fixture had the approval of the Queen's Bench in a case (*l*) where the question was whether certain colliery railways were exempt from distress as being fixtures :—

(*d*) Pugh *v.* Arton (1869), L. R. 8 Eq. 626; 38 L. J. Ch. 619.

(*e*) See Barff *v.* Probyn (1895), 64 L. J. Q. B. 557; 73 L. T. 118.

(*f*) (1896), 66 L. J. Q. B. 5; 75 L. T. 274.

(*g*) See Lawton *v.* Lawton (1743), 3 Atk. 14; Trappes *v.* Harter (1833), 2 C. & M. 153; 3 Tyr. 604.

(*h*) Beck *v.* Rebow (1706), 1 P. Wms. 94; but see Cave *v.* Cave (1705), 2 Vern. 508; and Leigh *v.* Taylor, *supra*.

(*i*) Colegrave *v.* Dios Santos (1823), 2 B. & C. 76; 3 D. & R. 255.

(*k*) Hallen *v.* Runder (1834), 1 C. M. & R. 266; 3 Tyr. 959; Lee *v.* Gaskell (1876), 1 Q. B. D. 700; 45 L. J. Q. B. 540.

(*l*) Turner *v.* Cameron (1870), L. R. 5 Q. B. 306; 39 L. J. Q. B. 125.

"It is necessary, in order to constitute a fixture, that the article in question should be let into or united to the land, or to some substance previously connected with the land. It is not enough that it has been laid upon the land and brought into contact with it; the definition requires *something more than mere juxtaposition*, as that the soil shall have been displaced for the purpose of receiving the article, or that the chattel should be cemented or otherwise fastened to some fabric previously attached to the ground."

In determining whether or not a chattel has become a fixture, the intention of the person affixing it to the soil is material only so far as it can be presumed from the degree and object of the annexation (*m*).

An engine or machinery affixed by means of screws and bolts to a concrete bed in freehold land, for the purpose of driving a saw-mill on the land, will, in the absence of special circumstances, cease to be a chattel and become part of the freehold (*n*).

Constructive annexation.

It may be remarked, however, that there can be a "constructive annexation." Keys, heirlooms, charters, deeds, fish, &c., are considered for most purposes to be annexed to the freehold.

By way of further illustration of this subject, reference may be made to the case of Wake *v.* Hall (*o*), where the right of a miner under the High Peak Mining Customs and Mineral Courts Act, 1851 (14 & 15 Vict. c. 94), as against the surface owner to remove buildings erected for mining purposes, was discussed, and the maxim "*quicquid plantatur*, &c.," was held inapplicable.

(*m*) Hobson *v.* Gorringe, [1897] 1 Ch. 182; 66 L. J. Ch. 114; explaining Holland *v.* Hodgson (1872), L. R. 7 C. P. 328; 41 L. J. C. P. 146; and distinguishing Wood *v.* Hewett (1846), 8 Q. B. 913; 15 L. J. Q. B. 247; and Lancaster *v.* Eve (1859), 5 C. B. N. S. 717; 28 L. J. C. P. 235. But see Leigh *v.* Taylor and Monti *v.* Barnes, *supra*.

(*n*) See Reynolds *v.* Ashby, [1903] 1 K. B. 87; 72 L. J. K. B. 51; following Hobson *v.* Gorringe, *supra;* and distinguishing Gough *v.* Wood, [1894] 1 Q. B. 713; 63 L. J. Q. B. 564. Chairs fixed to the floor of a hippodrome by a tenant were recently held not to be fixtures to which a mortgagee of the building would become entitled. Lyon *v.* London City and Midland Bank, [1903] 2 K. B. 135; 72 L. J. K. B. 465.

(*o*) (1883), 8 App. Cas. 195; 52 L. J. Q. B. 494.

Gifts.

IRONS *v.* SMALLPIECE. (1819) [86]

[2 B. & Ald. 551; 21 R. R. 395.]

Twelve months before his death, and while he believed himself to be still in the prime of life, Mr. Irons, by word of mouth, made his son a present of a pair of horses. The horses, however, were not delivered over by the donor to the donee, but remained in the father's possession until his death; and this was an action by the son, after the old gentleman's death, to obtain possession of them. In this attempt, however, he failed, on the ground that "by the law of England, *there must either be a deed or instrument of gift, or there must be an actual delivery* of the thing to the donee." *I.e.*, under seal.

The necessity of delivery in order to constitute a valid gift of a chattel was affirmed by the Court of Appeal in Cochrane *v.* Moore (*p*). The whole of the authorities on the subject, from Bracton to the present time, are fully considered in the learned and exhaustive judgment delivered by Fry, L. J.; the result being to affirm the decision in Irons *v.* Smallpiece. Reference may usefully be made to an article on this subject by Sir F. Pollock, in the "Law Quarterly Review" (1890), p. 446.

Importance of delivery.

The necessity for delivery is not dispensed with though the chattel is already in the possession of the donee (*q*). But the delivery spoken of is a delivery of possession, and does not necessarily mean an actual handling of the articles given. If, therefore, the possession is changed in consequence of a verbal gift—as where the possession has been held in one capacity up to the time of the gift, and from that time it is held in another capacity—the gift is completed (*r*).

(*p*) (1890), 25 Q. B. D. 57; 59 L. J. Q. B. 377; and see *In re* Ridgway (1885), 15 Q. B. D. 447; 54 L. J. Q. B. 570.

(*q*) Shower *v.* Pilch (1849), 4 Ex. 478; but see Cain *v.* Moon, [1896] 2 Q. B. 283; 65 L. J. Q. B. 34; and *In re* Weston, [1902] 1 Ch. 680; 71 L. J. Ch. 343.

(*r*) Kilpin *v.* Ratley, [1892] 1

Declaration of trust.

But, even where there is neither deed nor delivery, if the donor declares that he retains possession *in trust* for the donee, equity will enforce the trust. But the declaration must be pretty clear.

Giving cheques to babies.

A father once put a cheque for £900 into the hand of his son of nine months old, saying, "*Look you here, I give this to baby; it is for himself, and I am going to put it away for him, and will give him a great deal more along with it.*" "Don't let him tear it," remarked the mother. "Never mind if he does," sharply replied her lord, "*it is his own, and he may do what he likes with it.* Now, Lizzie,"—this to the nurse—"I am going to put this away for my own son." Then the fond parent took the cheque away from the unappreciative infant and locked it away in an iron safe. A week afterwards, meeting his solicitor, he said, "I shall come to your office on Monday to alter my will, that I may take care of my son." The same day—such is life!—he died, and the cheque was found amongst his effects. It was held that, though a parol declaration of trust in favour of a volunteer may be valid, there had under the circumstances been no gift to, or valid declaration of trust for, the son (*s*). "It was all quite natural," remarked Lord Cranworth, L. C., "but the testator would have been very much surprised if he had been told that he had parted with the £900, and could no longer dispose of it. It all turns upon the facts, which do not lead me to the conclusion that the testator meant to deprive himself of all property in the note, or to declare himself a trustee of the money for the child."

Hill *v.* Hill.

As to what is an absolute gift, reference may be made to the recent case of Hill *v.* Hill (*t*).

Bull *v.* Smith.

A testator a few days before his death bought through a broker on the Stock Exchange certain stocks and shares. On the day before his death, this being also "name day" on the Stock Exchange, in accordance with the testator's instructions, his wife's name was passed as the transferee of the stocks and shares. The testator died before the transfers were executed. Byrne, J., recently held that, under these circumstances, the gift of the stocks and shares to the wife was complete (*u*).

Gift to person in

When a fiduciary or confidential relation exists between the

Q. B. 582; 66 L. T. 797; and see Winter *v.* Winter (1861), 4 L. T. 639; and Alderson *v.* Peel (1891), 7 Times L. R. 418.

(*s*) Jones *v.* Lock (1865), L. R. 1 Ch. 25; 35 L. J. Ch. 117; and see Ellison *v.* Ellison (1802), 6 Ves. 656; 6 R. R. 19; *Ex parte* Pye (1811), 18 Ves. 140; 11 R. R. 173; Donaldson *v.* Donaldson (1854), Kay, 711.

(*t*) [1897] 1 Q. B. 483; 66 L. J. Q. B. 329.

(*u*) *In re* Smith, Bull *v.* Smith (1901), 84 L. T. 835.

donor and the donee, there is presumption that undue influence has been exercised by the donee, and the onus lies on him of showing that the transaction is one that can be supported. Thus, a donation from a child to a parent (*x*), or from a ward to a guardian (*y*), or from a beneficiary to an executor (*z*), is looked upon with great suspicion. So, as the leading case (*a*) on the subject shows us, women sometimes require to be protected against designing men. "Perhaps no general rule can well be laid down as to what amounts to undue influence: that will be a question for the judge to decide upon the circumstances of each particular case, and such circumstances as the *non-intervention of a disinterested person*, or professional adviser, on the behalf of the donor—especially if the donor is, from age or weakness of disposition, likely to be imposed upon,—the *statement of a consideration where there was actually none*, the *absence of a power of revocation*, the *improvidence of the transaction*, furnish a probable, though not always a certain, test of undue influence or fraud" (*b*). Fiduciary relation presumed to have been procured by undue influence.

The rule of equity, that where the relation of solicitor and client existed at the time when a voluntary gift was made to the solicitor the gift will be set aside, unless the donor had competent and independent advice, is absolute; and it applies to the case where a gift is made not to the solicitor but to the solicitor's wife. The presumption that there was undue influence cannot be rebutted by evidence to the contrary (*c*)—and where a solicitor and trustee of a settlement prepared a supplemental deed by which a lady, whom it was his duty to advise, and who trusted in him, deprived herself of a general power of appointment which preceded a limitation in the settlement in favour of two reversioners, *one of whom was the solicitor's own son*, the Court of Appeal recently set aside the deed, so far as it extinguished the general power of appointment, as against both reversioners, on the ground that the lady had not had sufficient independent advice (*d*). Solicitor and client.

(*x*) See Wright *v.* Vanderplank (1855), 2 K. & J. 1; 25 L. J. Ch. 753; Cocking *v.* Pratt (1750), 1 Ves. 401; Blackborn *v.* Edgeley (1719), 1 P. Wms. 600; and Firmin *v.* Pulham (1848), 2 De G. & Sm. 99.

(*y*) See Hylton *v.* Hylton (1754), 2 Ves. 549; Hatch *v.* Hatch (1804), 9 Ves. 292; 7 R. R. 195. And see the judgment of Farwell, J., in the recent case of Powell *v.* Powell, [1900] 1 Ch. 243; 69 L. J. Ch. 164.

(*z*) Wheeler *v.* Sargeant (1893), 69 L. T. 181; 3 R. 663.

(*a*) Huguenin *v.* Baseley (1807), 14 Ves. 273; 9 R. R. 148, 276.

(*b*) 1 Wh. & T. Eq. L. C. p. 268 (7th ed.); and see Morley *v.* Loughnan, [1893] 1 Ch. 736; 62 L. J. Ch. 515. See also the cases *sub tit.* "Duress," *ante*, p. 173, and the recent case of Rees *v.* De Bernardy, [1896] 2 Ch. 437; 65 L. J. Ch. 656.

(*c*) Liles *v.* Terry, [1895] 2 Q. B. 679; 65 L. J. Q. B. 34; and see Wright *v.* Carter (1902), 86 L. T. 110.

(*d*) Barron *v.* Willis, [1900] 2

Husband and wife.

The relation of husband and wife is not one of those relations to which the doctrine of Huguenin *v.* Baseley (*supra*) applies; and there is, therefore, no presumption that a voluntary deed executed by a wife in favour of her husband and prepared by the husband's solicitor is invalid, but the *onus probandi* lies on the person who impugns the instrument, and not on the person who supports it (*e*).

The two cases of Mitchell *v.* Homfray (*f*), and Taylor *v.* Johnston (*g*), may be mentioned here.

The doctor's best patient.

The action in the former case was by the executors of a Mrs. Geldard to recover a sum of £800 from the defendant, who had acted as her medical attendant. The £800 had been given by Mrs. Geldard to the defendant while she was his patient, and without her having any independent advice; but the doctor had not been guilty of any undue influence; and, after the relation of physician and patient had ceased, Mrs. Geldard elected to abide by the gift, and did, in fact, abide by it during the remaining three or four years of her life. Under these circumstances it was held that the gift could not be impeached after Mrs. Geldard's death, notwithstanding that it was not proved that the donor was aware that the gift was voidable at her election. "In Rhodes *v.* Bate" (*h*), said Lord Selborne, L. C., "it was laid down in clear terms that, in order to uphold a gift made to a person standing in a confidential relation, the donor must have had competent and independent advice in conferring it. This is undoubtedly the rule *so long as the confidential relation exists;* but it is not laid down in Rhodes *v.* Bate that advice of that kind is necessary *when the confidential relation has come to an end, and the donor is no longer subject to its influence.*" "If the transaction," said Baggallay, L. J., "was not formally ratified, it was at all events *adopted;* and for three years before her death the testatrix kept to her determination not to impeach it."

A strong-minded young lady.

In Taylor *v.* Johnston (*i*), the action was by personal representatives for much the same purpose as in the case last referred to, and it was held that, in the absence of proof of the exercise of control or influence on the part of the donee, or of the existence of the

Ch. 121; 69 L. J. Ch. 532; affirmed by the House of Lords, Willis *v.* Barron, [1902] A. C. 271; 71 L. J. Ch. 609.

(*e*) Barron *v.* Willis, [1899] 2 Ch. 578; 68 L. J. Ch. 604; following Nedby *v.* Nedby (1852), 5 De G. & Sm. 377.

(*f*) (1881), 8 Q. B. D. 587; 50 L. J. Q. B. 460.

(*g*) (1882), 19 Ch. Div. 603; 51 L. J. Ch. 879; and see *In re* Parker, Barker *v.* Barker (1880), 16 Ch. D. 44.

(*h*) (1866), L. R. 1 Ch. 252; 35 L. J. Ch. 267.

(*i*) *Supra.*

relation of guardian and ward between the donee and the donor, *a gift of her property within a month before her death by an infant of twenty of business habits, firm will, and fully capable of managing her own affairs to a relative* with whom she had been living from the time of her father's death five months before, was not invalid. "She was at this time," said the Court, "in a moribund state, as nobody can doubt. The doctor who spoke to the state of her health speaks of it as *wasting*, of her *death as certain*, but of her *mind as perfectly clear*, her *actions wholly uncontrolled*. Under these circumstances it is that she made the donation in question. Now, in my opinion, it is perfectly lawful, under such circumstances, for an infant to make a donation. If the relationship of guardian and ward had subsisted,——," that would have been a very different thing.

When a gift is void as having been obtained by undue influence, the property can be recovered not only from the donee but also from other persons who may have innocently received it from the donee (*k*). Morley *v.* Loughnan.

A *donatio mortis causâ* is a conditional gift of personalty made in contemplation of death (*l*). The donor would prefer (*m*) that he himself should remain the owner of the thing he gives, rather than that it should have a new owner, whether the donee or anybody else; but he is very ill and expects to die, and, knowing that he cannot carry his property away with him, he hands it over to the donee, to be his in the anticipated event of death. But the gift will be defeated not only by the donor's *getting better* (*n*), but also by his *revoking* (*o*) it. And even though the donor does not expressly say that he will want the thing back if he recovers, the *law will imply a condition* to that effect (*p*). There must be an actual delivery of the thing to the donee, or to someone else for the donee's use (*q*), but the antecedent delivery of the chattel *alio intuitu* to the donee is sufficient (*r*), and the donor must part, not only with the posses- *Donationes mortis causâ.* Attitude of donor. Recovery or revocation. Actual delivery necessary.

(*k*) See Morley *v.* Loughnan, [1893] 1 Ch. 736; 62 L. J. Ch. 515.

(*l*) *Quære*, whether there can be a valid *donatio mortis causâ* when the donor at the time of the donation is in good bodily health? See Agnew *v.* Belfast (1896), 2 Ir. R. 204.

(*m*) Et, in summâ, mortis causâ donatio est cum magis *se* quis velit habere quam *eum* cui donatur, magisque *eum* cui donat quam *heredem* suum. Just. Inst., Lib. 2, Tit. 7.

(*n*) Staniland *v.* Willott (1852), 3 Mac. & G. 664.

(*o*) See Edwards *v.* Jones (1836), 1 My. & Cr. 226; 5 L. J. (N. S.) Ch. 194; Tate *v.* Hilbert (1793), 2 Ves. jun. 111; 4 Bro. C. C. 286.

(*p*) Gardner *v.* Parker (1818), 3 Madd. 184; 18 R. R. 213.

(*q*) Drury *v.* Smith (1717), 1 P. Wms. 404.

(*r*) Cain *v.* Moon, [1896] 2 Q. B. 283; 65 L. J. Q. B. 587.

sion, but the dominion (*s*), though the gift may be saddled with a trust (*t*). A mere delivery to an agent as agent *for the donor* will not do (*u*). It is not sufficient to deliver *a symbol;* but where the nature of the thing will not admit of a corporeal delivery, a delivery of the *means of coming at the possession* (*e.g.*, a key) will be effective (*x*). In the leading case (*y*) on *donationes mortis causâ* it was held that the delivery of receipts for South Sea annuities was not enough to pass the stock, notwithstanding that there was strong evidence of the intent to make a gift of such annuities.

Mere symbol will not do, but key will.

Receipts for South Sea annuities.

A *donatio mortis causâ* probably cannot be made by *deed without delivery* (*z*).

Deed without delivery.

There may be a *donatio mortis causâ* of bonds (*a*), bank-notes (*b*), deposit receipts (*c*), mortgage-deeds (*d*), policies of insurance (*e*), or promissory notes payable to order though not indorsed (*f*); but not of cheques (*g*), or railway stock (*h*), or certificates of investment shares in a building society (*i*). An old farmer, some years ago, being in his last illness, gave his nephew, who had for some years lived with him and helped him in his business, a cheque for £4,000, and with it his banker's pass-book. Then the old man died, having provided properly, as he thought, for his nephew. But when, after his uncle's death, the young man went to the bankers, they refused to cash the cheque; and when he came afterwards to

Documents.

(*s*) Hawkins *v.* Blewitt (1798), 2 Esp. 663; 5 R. R. 761.

(*t*) Blount *v.* Barrow (1792), 4 Bro. C. C. 72; Hills *v.* Hills (1841), 8 M. & W. 401; 5 Jur. 1185; *In re* Richards (1887), 36 Ch. D. 541; 56 L. J. Ch. 923.

(*u*) Farquharson *v.* Cave (1846), 2 Coll. 356.

(*x*) Jones *v.* Selby (1710), Prec. Chanc. 300; Smith *v.* Smith (1735), 2 Stra. 955; Bunn *v.* Markham (1816), 7 Taunt. 224; Holt. 352.

(*y*) Ward *v.* Turner (1752), 2 Ves. 431; and 1 Wh. & T. L. C. p. 390 *et seq.* (7th ed.). See also *In re* Hughes (1888), 59 L. T. 586; 36 W. R. 821.

(*z*) See Wms. Exors. p. 684 (9th ed.).

(*a*) Snelgrove *v.* Bailey (1744), 3 Atk. 214; *In re* Taylor (1887), 56 L. J. Ch. 597.

(*b*) Miller *v.* Miller (1735), 3 P. Wms. 356.

(*c*) Porter *v.* Walsh (1896), 1 Ir. R. 148; and see Griffin *v.* Griffin, [1899] 1 Ch. 408; 68 L. J. Ch. 220; and Treasury Solicitor *v.* Lewis, [1900] 2 Ch. 812; 69 L. J. Ch. 833.

(*d*) Duffield *v.* Hicks (1827), 1 Bligh, N. S. 497; 1 D. & C. 1.

(*e*) Witt *v.* Amiss (1861), 1 B. & S. 109; 30 L. J. Q. B. 318.

(*f*) Veal *v.* Veal (1859), 27 Beav. 303; 29 L. J. Ch. 321; *In re* Mead (1880), 15 Ch. D. 651; 50 L. J. Ch. 30; *In re* Whitaker (1889), 42 Ch. D. 119; 58 L. J. Ch. 487; *In re* Dillon (1890), 44 Ch. D. 76; 59 L. J. Ch. 420.

(*g*) Hewitt *v.* Kaye (1868), L. R. 6 Eq. 198; 37 L. J. Ch. 633; but see Clement *v.* Cheeseman (1884), 27 Ch. D. 631; 33 W. R. 40; and *In re* Shield, Pechy Ridge *v.* Burrow (1885), 53 L. T. 5.

(*h*) Moore *v.* Moore (1874), L. R. 18 Eq. 474; 43 L. J. Ch. 617.

(*i*) *In re* Weston, Bartholomew *v.* Menzies, [1902] 1 Ch. 680; 71 L. J. Ch. 343.

Lincoln's Inn, he found that neither could the transaction be supported as a valid *donatio mortis causâ* (*k*). But a Post Office Savings Bank book may be a good subject of such a gift, and the delivery of the book will pass the right to the money on deposit (*l*).

How *donatio mortis causâ* differs from legacy and from gift *inter vivos*.

A *donatio mortis causâ* differs from a legacy in the two points that neither probate (*m*) nor the executor's assent (*n*) are necessary. It differs from a gift *inter vivos* in the three points that (1) it is revocable, (2) it is liable to estate duty (*o*), and (3) to debts (*p*).

Unsuccessful efforts.

An attempt to make an irrevocable gift *inter vivos* cannot be supported as a *donatio mortis causâ* (*q*); nor can an invalid testamentary gift be vivified in this way (*r*).

Gift to husband and wife.

The old and familiar rule of law that husband and wife are for most purposes considered as but one person, so that under a gift by will to a husband and wife and a third person, the husband and wife take one moiety between them, the third person taking the other moiety, is still applicable, and has not been displaced by the Married Women's Property Act, 1882 (*s*).

Married Women's Property Act, 1882.

In Standing *v.* Bowring (*t*), the plaintiff, a widow, in the year 1880, caused a sum of £6,000 Consols to be transferred into the joint names of herself and the defendant, who was her godson, and in whose welfare she took great interest. This transfer was not made known to the defendant. In 1882, the plaintiff, then eighty-eight years old, married a second husband, and soon afterwards applied to the defendant to re-transfer the stock into her name alone. It was decided that the transfer was originally made with the deliberate intention of benefiting the defendant, and not with a view to the creation of a trust. The Court would not, therefore, compel the defendant to re-transfer the stock.

As to gifts defrauding creditors, see *infra*.

(*k*) Beak *v.* Beak (1872), L. R. 13 Eq. 489; 41 L. J. Ch. 470; followed in *In re* Beaumont, [1902] 1 Ch. 889; 71 L. J. Ch. 478. See also *In re* Davis (1902), 86 L. T. 889.

(*l*) *In re* Weston, *supra*; and *In re* Andrews, [1902] 2 Ch. 394; 71 L. J. Ch. 676.

(*m*) Thompson *v.* Hodgson (1727), 2 Stra. 777; Rigden *v.* Vallier (1751), 2 Ves. sen. 252.

(*n*) Tate *v.* Hilbert (1785), 2 Ves. jun. 111.

(*o*) 36 Geo. 3, c. 52, s. 7; 8 & 9 Vict. c. 76, s. 4. See the Finance Act, 1894 (57 & 58 Vict. c. 30), s. 2 (c).

(*p*) Smith *v.* Drury (1717), 1 P. Wms. 404.

(*q*) Edwards *v.* Jones (1836), 1 My. & Cr. 226.

(*r*) Mitchell *v.* Smith (1864), 12 W. R. 941; 4 De G. J. & S. 422.

(*s*) *In re* Mareh, Mander *v.* Harris (1884), 27 Ch. D. 166; 54 L. J. Ch. 143; *In re* Jupp, Jupp *v.* Buckwell (1888), 39 Ch. D. 148; 57 L. J. Ch. 774; Butler *v.* Butler (1885), 14 Q. B. D. 831; per Wills, J., affirmed by C. A., 16 Q. B. D. 374; 55 L. J. Q. B. 55.

(*t*) (1885), 31 Ch. D. 282; 55 L. J. Ch. 218.

Bills of Sale, &c.

[87] TWYNE'S CASE. (1585)

[3 Rep. 80.]

A Hampshire farmer named Pierce got deeply into debt, and amongst his creditors were two persons named Twyne and Grasper. To the former he owed £400, and to the latter £200. After repeatedly dunning the farmer in vain, Grasper decided to go to law for his money, and had a writ issued. As soon as Pierce heard of this, he took the other creditor, Twyne, into his confidence, and in satisfaction of the debt of £400 made a secret conveyance to him of everything he had. In spite of this deed, however—in pursuance of the nefarious arrangement between them—Pierce continued in possession just as if he had never made it. He sold some of the goods, sheared and marked some of the sheep, and in every way acted as if he were the absolute owner, and Twyne had nothing to do with it. Meanwhile Grasper went on with his action, got judgment, and consequently the assistance of the sheriff of Southampton, who appeared one day at the homestead with the intention of carrying off, in Mr. Grasper's interest, whatever he might chance to find there. This proceeding Twyne, who suddenly appeared on the scene, strongly objected to, for, said he, "Everything on this farm belongs to *me*, not to Pierce"; and, in proof of his assertion, he produced the deed of conveyance.

The question was whether this deed of conveyance was void within the meaning of an Act of Parliament passed in Queen Elizabeth's reign, which provides that all gifts made for the purpose of cheating creditors shall be void.

And, for the following reasons, this gift of Pierce's was considered to be just the kind of gift contemplated by the statute :—

(1.) It was impossible that anybody could really be so generous as Mr. Pierce had proposed to be. He had given away everything he had in the world, even down to the boots he was wearing. Such self-denial could only be the cloak of fraud.

(2.) In spite of his parade of liberality, Mr. Pierce did not let one of his things go, but used them all just as if they were his own, thereby obtaining a factitious credit in the world.

(3.) Then, if there was no fraud, why was there so much mystery about it? Why was not the gift made openly?

(4.) The gift was made, too, when Grasper had already commenced an action, and evidently meant business.

(5.) There was a trust between the parties, and trust was only another name for fraud.

(6.) The deed alleged that the gift was made "honestly, truly, and *bonâ fide*," and that was a very suspicious circumstance in itself.

Gifts defrauding creditors.

It is declared by 13 Eliz. c. 5, that all gifts and conveyances, whether of lands or chattels, made for the purpose of delaying or defrauding creditors, shall be null and void as against such creditors. There is, however, a proviso excepting from the operation of this enactment gifts and conveyances made upon valuable consideration and *bonâ fide* to persons having no notice of the fraud. Now, it is clear that Pierce's gift was for valuable consideration. Why, then, did it not fall within the proviso? The answer obviously is, because it was not *bonâ fide*. It was merely the creation of a trust for the benefit of Pierce himself. And in considering whether a conveyance is void under the statute, the Court must look at the whole of the circumstances surrounding the execution of the conveyance and see whether it was in fact executed with the intent to defeat and delay creditors (*u*).

(*u*) *In re* Holland, Gregg *v.* Holland, [1902] 2 Ch. 360; 71 L. J. Ch. 518.

Fraud sometimes presumed.

In order that a mere voluntary settlement may be void within the statute, it is not necessary to prove that an actual intention to delay or defraud his creditors was present to the mind of the settlor at the time when the deed was executed. It is sufficient to set aside such a gift as fraudulent if the *necessary consequence of it* is so to delay or defraud the creditors (*x*). In such case the fraudulent intention will be presumed to exist. Thus, a man who contemplates entering upon a hazardous business cannot, on the eve of doing so, take the bulk of his property out of the reach of those who may become his creditors in his trading operations by settling it upon his wife and children (*y*). On the other hand, a voluntary settlement, if made *bonâ fide* by a person having sufficient means outside the settlement for payment of present debts, is not void under the statute simply because afterwards the effect proves to be to defeat or delay future creditors (*z*). Sect. 5 of 13 Eliz. c. 5, however, protects a purchaser for value of any interest, legal or equitable, derived under a settlement which is fraudulent and void under the statute as against creditors, provided such purchaser had no notice of its fraudulent nature (*a*). It may, too, be noticed that provision is made by the Bankruptcy Act, 1883, s. 47, for the avoidance, in most cases, of voluntary settlements made by a trader within two years of his bankruptcy, or, indeed, within ten years, "unless the parties claiming under such settlement can prove that the settlor was, at the time of making the settlement, able to pay all his debts without the aid of the property comprised in such settlement" (*b*). But under this section, a voluntary settlement does not, in the event of the bankruptcy of the settlor, under the circumstances in the section mentioned, become void against the trustee in the bankruptcy *ab initio*, but only as from the date of the act of bankruptcy; and *bonâ fide* purchasers for value, who have before that date purchased property comprised in the settlement, whether from the trustees of the settlement or the volunteers claiming under it, get a good title (*c*).

(*x*) Freeman *v.* Pope (1870), L. R. 5 Ch. 538; 39 L. J. Ch. 689.

(*y*) Mackay *v.* Douglas (1872), L. R. 14 Eq. 106; 41 L. J. Ch. 539; *Ex parte* Russell, *In re* Butterworth (1882), 19 Ch. D. 588; 51 L. J. Ch. 521; *In re* Troughton (1894), 71 L. T. 427; but see *In re* Cranston (1892), 9 M. B. R. 160.

(*z*) *In re* Lane-Fox, *Ex parte* Gimblett, [1900] 2 Q. B. 508; 69 L. J. Q. B. 722.

(*a*) Halifax Banking Co. *v.* Gledhill, [1891] 1 Ch. 31; 60 L. J. Ch. 181.

(*b*) See *In re* Vansittart (No. 1), [1893] 1 Q. B. 181; 62 L. J. Q. B. 277; (No. 2), [1893] 2 Q. B. 377; 62 L. J. Q. B. 279; *In re* Brall, [1893] 2 Q. B. 381; 62 L. J. Q. B. 457; *In re* Naylor (1893), 63 L. J. Q. B. 460; 69 L. T. 355; Tasker *v.* Tasker, [1895] P. 1; 64 L. J. P. 36; and *In re* Tankard, [1899] 2 Q. B. 57; 68 L. J. Q. B. 670.

(*c*) *In re* Carter and Kenderdine's

Fraudulent preference.

It is important that it should be understood that a deed is not necessarily void because it amounts to an assignment of *all* the grantor's property for the benefit of a particular creditor or of particular creditors. There is nothing at common law to prevent a debtor preferring one creditor to another, and the Statute of Elizabeth does not touch the question of equal distribution of assets. "If the deed is *bonâ fide*—that is, if it is not a mere cloak for retaining a benefit to the grantor—it is a good deed under the Statute of Elizabeth" (*d*). Such a deed may, it is true, operate as an act of bankruptcy, or it may be void as amounting to a fraudulent preference within the meaning of the bankruptcy laws (*e*); but, if the time be past within which the execution of the deed is an act of bankruptcy available for adjudication against the grantor, or within which the deed can be set aside as a fraudulent preference, it cannot be treated as void within the policy of the bankruptcy laws (*f*).

Boldero's case.

It has been decided that a deed, by which insolvent debtors conveyed all their estate to trustees on trust for sale and division of the proceeds amongst the creditors parties to the deed, was not void under the Statute of Elizabeth, although it contained a clause leaving it in the discretion of the trustees not to pay any dividend to creditors who had neglected or refused to execute the deed (*g*). The Court distinguished the case from the somewhat similar one of Spencer *v.* Slater (*h*), where the deed was held to be void, on the ground that in the latter case the primary object was to carry on, not to sell, the business; and there was, moreover, in Spencer *v.* Slater a peculiar resulting trust under which, at the expiration of twelve months, the debtor might apply to the trustees to be paid the dividends of creditors who neglected or refused to assent to or execute the deed, and then, if the creditors did not within seven days assent or execute, the money was to be paid to the debtor. And in the recent case of Maskelyne *v.* Smith (*i*), it was held that a deed of arrangement with creditors, which was intended

Spencer *v.* Slater.

Contract, [1897] 1 Ch. 776; 66 L. J. Ch. 408; disapproving *In re* Briggs and Spicer, [1891] 2 Ch. 127; 60 L. J. Ch. 514; and following *In re* Vansittart and *In re* Brall, *supra*.

(*d*) Per Giffard, L. J., Alton *v.* Harrison (1869), L. R. 4 Ch. at p. 626; 38 L. J. Ch. 669.

(*e*) See 46 & 47 Vict. c. 52.

(*f*) *Ex parte* Garnes, *In re* Bamford (1879), 12 Ch. D. 314; 40 L. T. 789.

(*g*) Boldero *v.* London and Westminster Loan Co. (1879), 5 Ex. D. 47; 42 L. T. 56.

(*h*) (1878), 4 Q. B. D. 13; 48 L. J. Q. B. 204; and see Golden *v.* Gillam (1882), 51 L. J. Ch. 154, 503; 46 L. T. 222; *In re* Ridler (1883), 22 Ch. D. 74; 52 L. J. Ch. 343.

(*i*) [1903] 1 K. B. 671; 72 L. J. K. B. 237.

to give effect to a *bonâ fide* scheme of arrangement for their benefit, was not void under 13 Eliz. c. 5, as tending to delay creditors, merely because it reserved a benefit to the debtor, nor because some of the creditors were intentionally excluded from its operation.

Bills of sale.

The present subject derives great interest and importance from its connection with bills of sale, which are regulated by special and elaborate statutory provisions (*k*). It is sufficient here to say that a bill of sale is an instrument by which one man purports to grant to another his interest in the goods and chattels specified in such instrument. Prior to the legislation of modern times, the continuance in possession by the grantor was viewed as a badge of fraud, and hence as a circumstance serving to avoid the transaction under the Statute of Elizabeth. Now, it was clearly beneficial that the owner of personal property should be able to make such a transfer without any actual change of possession, and yet that publicity should be given to the transaction. This result was accomplished by enacting that a bill of sale, if duly made and duly registered in the manner prescribed, should be valid whether the grantor continued in possession or not, and that even as against his trustee in bankruptcy. Under the Act of 1878, the registration is to take place within seven days, instead of twenty-one as formerly; the consideration is to be set forth in the bill of sale; and the necessity of attestation is introduced. The Act of 1882 (*l*), which is to be construed together with the 1878 Act, renders entirely void every bill of sale given in consideration of any sum under £30, or which is not duly attested and registered, or which does not truly set forth the consideration for which it was given. The Act also supplies a form in accordance with which the bill of sale must be drawn, and provides that it shall have attached a schedule containing an inventory of the property comprised therein (*m*). For further information reference should be made to the statutes and treatises bearing on the subject.

Act of 1882.

In re Cook, Morris *v.* Morris.

In cases not governed by the Bills of Sale Act, 1882, where a loan of money is made to a person who is apparently solvent at the time, and a bill of sale is given to secure the loan, but is not registered, and possession of the goods is not taken by the grantee until immediately before the grantor's bankruptcy, the transaction (not being invalidated by any statute) is not rendered void by 13 Eliz. c. 5, or the law of bankruptcy, unless an intention can be shown to defeat and delay creditors. A promise volunteered by the

(*k*) 17 & 18 Vict. c. 36; 41 & 42 Vict. c. 31; 45 & 46 Vict. c. 43.

(*l*) 45 & 46 Vict. c. 43.

(*m*) See Coates *v.* Moore, [1903] 2 K. B. 140; 72 L. J. K. B. 539.

borrower, that he will give the lender information if his circumstances become precarious, does not necessarily show such intention (*n*).

It may, perhaps, be convenient here to mention the existence of 27 Eliz. c. 4. That statute, which is confined exclusively to *real property*, is in favour of purchasers, and makes void, as against subsequent purchasers of the same land, all gifts and conveyances made with the intention of defeating them, or containing a power of revocation. And it was settled by numerous decisions (*o*) that every *voluntary* conveyance was, by the statute, made void as against a subsequent *bonâ fide* purchaser for value (*p*). This, however, has recently been altered by the Voluntary Conveyances Act, 1893 (56 & 57 Vict. c. 21), which provides that voluntary conveyances, if in fact made *bonâ fide* and without any fraudulent intent, are not to be avoided under 27 Eliz. c. 4. This does not apply to transactions completed before the passing of the Act.

27 Eliz. c. 4.

Voluntary Conveyances Act, 1893.

Voluntary gifts *for charitable purposes* have recently been held (*q*) not to come within the meaning of 27 Eliz. c. 4, and so are not avoided by a subsequent conveyance for value.

Waiver of Forfeiture, &c.

DUMPOR *v.* SYMMS. (1603) [88]

(*Sometimes called Dumpor's Case.*)

[4 Coke, 119.]

In Elizabeth's reign the College of Corpus, Oxford, made a lease for years of certain land to a Mr. Bolde, exacting from him a covenant that he would not alien the property to anybody else without the College's consent.

(*n*) *In re* Cook, Morris *v.* Morris, [1895] A. C. 625; 64 L. J. P. C. 136; distinguishing *In re* Ash, *Ex parte* Fisher (1872), L. R. 7 Ch. 636; 41 L. J. Bkcy. 62.

(*o*) Doe *v.* Manning (1807), 9 East, 59; 9 R. R. 503.

(*p*) As to who are volunteers within the meaning of this Act, reference may be made to the recent case of De Mestre *v.* West, [1891] A. C. 264; 60 L. J. P. C. 66.

(*q*) Ramsay *v.* Gilchrist, [1892] A. C. 412; 61 L. J. P. C. 72; and see 43 Eliz. c. 4.

Three years afterwards the College by deed gave him permission to alien to anybody he pleased, and soon afterwards Bolde availed himself of this permission and assigned the term to one Tubb. Tubb made his will, devising the lands to his son, and died. The son entered, and also died, but intestate, and the ordinary granted administration to a person who assigned the term to the defendant Symms. Thereupon the wrath of the College of Corpus Christi was kindled. Bolde had covenanted with them not to assign without leave, and such a covenant, they said, should have been observed by whoever held the lands. Therefore they entered for the broken condition, and leased to Dumpor for twenty-one years. Dumpor entered, but Symms re-entered, and for doing so Dumpor now brought this action of trespass against him.

Dumpor did not succeed: the case was decided against him on the ground that "*if the lessors dispense with one alienation, they thereby dispense with all alienations after.*"

Uselessness of Dumpor's case.

"Dumpor's case always struck me as extraordinary," said a judge in 1807 (*r*). "The profession have always wondered at Dumpor's case," said another in 1812 (*s*). Yet such is the vitality of error that Dumpor's case remained law till 1860, when the legislature enacted that "every such licence should, unless otherwise expressed, *extend only to the permission actually given*" (*t*); and the next year another Act was passed prohibiting waivers *in particular instances* from being interpreted to mean *general* waivers (*u*).

Waiver of forfeiture.

But though, therefore, Dumpor's case is now of merely antiquarian interest, it is supposed to "lead" to the rather important subject of *waiver of forfeiture*.

Leaning of Courts against forfeitures.

The Courts lean against forfeiture, and therefore any positive act of the landlord from which it may be inferred that he elected to overlook the breach of covenant, and to continue the tenancy, will be greedily snatched at (*w*). The most satisfactory of the acts which

(*r*) Brummell *v.* Macpherson (1807), 14 Ves. 173.
(*s*) Doe *v.* Bliss (1812), 4 Taunt. 736.
(*t*) 22 & 23 Vict. c. 35, s. 1.
(*u*) 23 & 24 Vict. c. 38, s. 6.
(*w*) Ward *v.* Day (1864), 5 B. & S. 359; 33 L. J. Q. B. 254.

operate as a waiver of forfeiture is *acceptance of rent which has become due since the cause of forfeiture;* and if such rent is accepted, it is of no consequence that the landlord took it under protest and declaring that he did not intend to waive the forfeiture (*x*). But the landlord would not avoid the forfeiture by taking rent due *before* the forfeiture was incurred (*y*). When the landlord has once definitely made his election either way, he cannot go back from it; and so his receipt of rent after he has brought ejectment for a forfeiture comes too late to be a waiver (*z*), though there may be evidence of a new tenancy from year to year on the terms of the old lease (*a*). Moreover, the receipt of rent is no waiver of a *continuing breach, e.g.*, where the covenant is to keep the demised premises in repair during the term (*b*), or not to use certain rooms in a particular manner (*c*). There cannot be a waiver without knowledge of the forfeiture; and so a son who collected his father's rents was held not to have authority to waive a forfeiture which the father did not know had occurred (*d*). Acceptance of rent.

It is a very common condition in a lease that the tenant *shall not assign* without his landlord's consent (*e*). It has been held that this condition is not broken by a *compulsory assignment by law;* under the bankruptcy laws, for instance, or under a railway company's Act (*f*). But by inserting express words to that effect in the lease the lessor may make a compulsory assignment a ground of forfeiture; and a deed of assignment in trust for creditors registered under the Bankruptcy Act, 1861, s. 194, was held to work a for- Covenant by tenant not to assign without consent.

(*x*) Davenport *v.* The Queen (1877), 3 App. Cas. 115; 47 L. J. P. C. 8; and see Croft *v.* Lumley (1855), 5 E. & B. 648; 25 L. J. Q. B. 223. See also Penton *v.* Barnett, [1898] 1 Q. B. 276; 67 L. J. Q. B. 11, as to the effect of a claim by the landlord for rent, where there is a *continuing* breach of covenant by the tenant.

(*y*) Marsh *v.* Curteys (1596), Cro. Eliz. 528; Price *v.* Worwood (1859), 4 H. & N. 512; 28 L. J. Ex. 329.

(*z*) Doe d. Moorecroft *v.* Meux (1825), 4 B. & C. 606; 1 C. & P. 346; Jones *v.* Carter (1846), 15 M. & W. 718; Grimwood *v.* Moss (1872), L. R. 7 C. P. 360; 41 L. J. C. P. 239.

(*a*) Evans *v.* Wyatt (1880), 43 L. T. 176; 44 J. P. 767.

(*b*) Doe d. Baker *v.* Jones (1850), 5 Ex. 498; 19 L. J. Ex. 405. See also Penton *v.* Barnett, *supra*.

(*c*) Doe d. Ambler *v.* Woodbridge (1829), 9 B. & C. 376; 4 M. & R. 303.

(*d*) Doe d. Nash *v.* Birch (1836), 1 M. & W. 402; 5 L. J. Ex. 185.

(*e*) Such a covenant running with the land is broken even where the lessee for the time being so assigns to the original lessee. M'Eacharn *v.* Colton, [1902] A. C. 104; 71 L. J. P. C. 20.

(*f*) See Gentle *v.* Faulkner, [1900] 2 Q. B. 267; 69 L. J. Q. B. 777; *In re* Riggs, [1901] 2 K. B. 16; 70 L. J. K. B. 541; Doe d. Mitchinson *v.* Carter (1798), 8 T. R. 57; 4 R. R. 586; Slipper *v.* Tottenham Ry. Co. (1867), L. R. 4 Eq. 112; 36 L. J. Ch. 841. But as to the voluntary winding-up of a company, see Horsey Estate *v.* Steiger, [1898] 2 Q. B. 259; 67 L. J. Q. B. 747; [1899] 2 Q. B. 79; 68 L. J. Q. B. 743; and Fryer *v.* Ewart, [1902] A. C. 187; 71 L. J. Ch. 433.

feiture (*g*). The mere *grant of a licence* is generally not a breach of a covenant not to assign or underlet (*h*). *Marriage* has been held not to be a breach of the condition against alienation (*i*); nor (probably) is a *bequest* of the term (*k*). *Letting lodgings* has been held not to be a breach of a covenant not to *underlet* (*l*).

Consent "not to be arbitrarily withheld."

Sometimes the covenant a tenant enters into is that he will not assign without his landlord's consent, "*such consent not being arbitrarily withheld.*" These words, it has been held, do not amount to a covenant by the lessor that he will not refuse arbitrarily, but simply enable the lessee, if the lessor refuses his consent arbitrarily, to assign without any breach of covenant (*m*).

Restrictions on and relief against forfeiture of leases.

Section 14 of the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), considerably extended the power of the Court to relieve against forfeitures (*n*). Sub-sect. 1 provides that "A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice (*o*) specifying the particular breach complained of, and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach." And sub-sect. 2 entitles

(*g*) Holland *v.* Cole (1867), 1 H. & C. 67; 31 L. J. Ex. 481.

(*h*) See Grove *v.* Portal, [1902] 1 Ch. 727; 71 L. J. Ch. 299; Edwardes *v.* Barrington (1902), 85 L. T. 650; 50 W. R. 358; Daly *v.* Edwardes (1901), 83 L. T. 548; 49 W. R. 244.

(*i*) *Anon.*, Moor, 21.

(*k*) Fox *v.* Swann (1655), Style, 483; Doe *v.* Bevan (1815), 3 M. & S. 353; 16 R. R. 293.

(*l*) Doe d. Pitt *v.* Laming (1814), 4 Camp. 77; 15 R. R. 728.

(*m*) Treloar *v.* Bigge (1874), L. R. 9 Ex. 151; 43 L. J. Ex. 95; Scar *v.* House Property Co. (1880), 16 Ch. D. 387; 50 L. J. Ch. 77; and see Young *v.* Ashley Gardens, Limited, [1903] 2 Ch. 112; 72 L. J. Ch. 520. And as to the meaning of "arbitrary refusal," see the recent case of Bates *v.* Donaldson, [1896] 2 Q. B. 241; 65 L. J. Q. B. 578.

(*n*) See Barrow *v.* Isaacs, [1891] 1 Q. B. 417; 60 L. J. Q. B. 179; Eastern Telegraph Co. *v.* Dent, [1899] 1 Q. B. 835; 68 L. J. Q. B. 564; and Dymock *v.* Showell's Brewery Co. (1898), 79 L. T. 329.

(*o*) A notice which specifies the breach, but does not require the lessee to remedy it, seems to be insufficient. North London Land Co. *v.* Jacques, W. N. 1883, p. 187; 32 W. R. 283; Jacques *v.* Harrison (1884), 12 Q. B. D. 136, 165; 53 L. J. Q. B. 137; Greenfield *v.* Hanson (1886), 2 T. L. R. 876; 81 L. T. Newsp. 240. But a notice is not bad merely because it omits to require compensation. Lock *v.* Pearce, [1893] 2 Ch. 271; 62 L. J. Ch. 582. As to what is a sufficient "specification of the breach," see Fletcher *v.* Nokes, [1897] 1 Ch. 271; 66 L. J. Ch. 177; *In re* Serle, Gregory *v.* Serle, [1898] 1 Ch. 652; 67 L. J. Ch. 344; Jacob *v.* Down, [1900] 2 Ch. 156; 69 L. J. Ch. 493; and Pannell *v.* City of London Brewery, [1900] 1 Ch. 496; 69 L. J. Ch. 244.

the lessee to apply to the Court for relief when a lessor is proceeding to enforce a right of re-entry or forfeiture (*p*). It should be observed, however, that this section does not extend, "(i) To a covenant or condition against the assigning, under-letting, parting with the possession, or disposing of the land leased; or to a condition for forfeiture on the bankruptcy of the lessee, or on the taking in execution of the lessee's interest; or (ii) In the case of a mining lease, to a covenant or condition for allowing the lessor to have access to or inspect books, accounts, records, weighing machines, or other things, or to enter or inspect the mine or the workings thereof" (see sub-sect. 6) (*q*). And it is expressly provided that this section shall not affect the law relating to re-entry or forfeiture in case of non-payment of rent (sub-sect. 8).

Reference should also be made to the Conveyancing Act, 1892 (55 & 56 Vict. c. 13), which enables the Court to protect under-lessees on the forfeiture of superior leases; and this provision extends to cases in which the Court would have no power to grant relief to the lessee himself (*r*). But this jurisdiction is discretionary and must be exercised with caution (*s*). Act of 1892.

Covenants Running with the Land.

SPENCER *v.* CLARK. (1583) [89]

(*Sometimes called Spencer's Case.*)

[5 REP. 61.]

Spencer let a house and grounds to Smith for twenty-one years, and Smith covenanted to build a brick wall on the lands let to him. Smith assigned the demised pre-

(*p*) But application for relief must be made before the lessor has re-entered, see Rogers *v.* Rice, [1892] 2 Ch. 170; 61 L. J. Ch. 573; and per Jessel, M. R., in Quilter *v.* Mapleson (1882), 9 Q. B. D. 672; 52 L. J. Q. B. 44.

(*q*) See the Conveyancing Act, 1892 (55 & 56 Vict. c. 13), s. 2, sub-s. (2).

(*r*) Highgate or Cholmeley School *v.* Sewell, [1894] 2 Q. B. 906; 63 L. J. Q. B. 820; and see Nind *v.* Nineteenth Century Building Society, [1894] 2 Q. B. 226; 63 L. J. Q. B. 636.

(*s*) Imray *v.* Oakshette, [1897] 2 Q. B. 218; 66 L. J. Q. B. 544. It was also held in this case that sect. 4 of the Conveyancing Act, 1892, is not a section amending sect. 14 of the Conveyancing Act, 1881, but is an independent enactment.

mises to Jones, without having made the least attempt at building the brick wall. But Jones could not live there either, and he in his turn passed on the place to Clark. Meanwhile nobody had built the wall, and Spencer called on Clark to do it, saying that as the assignee he was bound by Smith's covenant.

It was decided, however, that Clark was *not* bound to build the wall, Smith not having covenanted for his assigns, but *only for himself*, as to a subject-matter *not in existence* at the time of the covenant.

Running with land.

A covenant is said to *run with the land* when either the liability to perform it, or the right to take advantage of it, passes to the assignee of that land.

Running with reversion.

A covenant is said to *run with the reversion* when either the liability to perform it, or the right to take advantage of it, passes to the assignee of that reversion.

At common law covenants run with the land, but not with the reversion. 32 Hen. VIII. c. 34, however, corrected that anomaly (*t*).

The law on the subject of covenants running with the land may be summed up as follows :—

(1.) Assigns not mentioned.

(1.) Suppose the lessee who makes the covenant *omits all mention of his assigns*, and thinks only of himself.

(a) If the covenant has to do with something *not in existence* at the time the lease is made, the assignee is not bound (*u*). This is precisely the case of Spencer *v.* Clark. The brick wall was not in existence at the time the lease was made, and indeed history does not record that it had any subsequent existence.

Minshull *v.* Oakes, bad law.

In Minshull *v.* Oakes (*x*), however, the Court expressed their opinion that it was not consistent with reason that the naming of the assigns in a covenant should vary the liability.

(b) "When the covenant extends to a thing *in esse, parcel of the demise*, the thing to be done by force of the covenant is in a manner annexed and appurtenant to the thing demised, and shall run with the land, and shall bind the assignee, although he be not bound by express words" (*y*).

(*t*) See Muller *v.* Trafford, [1901] 1 Ch. 54; 70 L. J. Ch. 72. See also 44 & 45 Vict. c. 41, ss. 10, 11, 12.

(*u*) Doughty *v.* Bowman (1848), 11 Q. B. 444; 17 L. J. Q. B. 111.

(*x*) (1858), 2 H. & N. 793; 27 L. J. Ex. 194.

(*y*) Per cur. in Bally *v.* Wells (1769), 3 Wils. 25.

"The following covenants seem to run with the land, so as to bind the assignee, whether of the reversion or the term, although not named:—A covenant to pay rent or taxes, or to repair, or to leave in repair; to maintain a sea wall *in esse* (*z*); to repair, renew, and replace tenants' fixtures and machinery fixed to the premises (*a*); not to plough; to use the land in a husbandlike manner; to lay dung on the demised land annually; to reside on the demised premises during the term; to permit the lessor to have access to two rooms excepted from the demise; to carry all the corn produced on the demised land to the lessor's mill to be ground (*b*); to leave the land as well stocked with game at the end of the term as it was found to be at the beginning of it (*c*); to supply demised houses with good water; for quiet enjoyment; to produce title deeds; to make further assurance; to renew the lease; to endeavour to procure a renewal of the lease for another life (in an underlease by lessee for lives); and to build a new smelting mill in lieu of an old one in a lease of mines (*d*). There is also authority that the covenant to insure (*e*), the covenant not to assign or sublet without licence (*f*), and the covenant not to carry on a particular trade (*g*), run with the land" (*h*). Particular covenants held to run with land.

The covenant by the lessee of an hotel with the lessor, his heirs and assigns, not to sell or permit to be sold upon the demised premises during the term any wines or spirits other than shall have been supplied by or through the lessor (a wine and spirit merchant), or his successors or assigns, is a covenant touching the land, and runs with the land, and is binding on the assigns of the lessee, although assigns are not named in the covenant (*i*). The fact that the ownership of the reversion to the demised property has become A tied house.

(*z*) Morland *v.* Cook (1868), L. R. 6 Eq. 252; 37 L. J. Ch. 825.

(*a*) Williams *v.* Earle (1868), L. R. 3 Q. B. 739; 37 L. J. Q. B. 231.

(*b*) Vyvyan *v.* Arthur (1823), 1 B. & C. 410; 2 D. & R. 670.

(*c*) Hooper *v.* Clark (1867), L. R. 2 Q. B. 200; 36 L. J. Q. B. 79.

(*d*) Sampson *v.* Easterby (1829), 9 B. & C. 505; 4 M. & R. 422.

(*e*) Vernon *v.* Smith (1821), 5 B. & Ald. 1; 24 R. R. 257.

(*f*) Williams *v.* Earle, *supra*.

(*g*) Congleton *v.* Pattison (1808), 10 East. 130.

(*h*) Woodf. Land. & Ten. p. 184 (17th ed.); and see Foa on Land. & Ten. p. 322 (2nd ed.).

(*i*) White *v.* Southend Hotel Co., [1897] 1 Ch. 767; 66 L. J. Ch. 387; applying the principles laid down in Tatem *v.* Chaplin (1793), 2 H. Bl. 133; 3 R. R. 360; Clegg *v.* Hands (1890), 44 Ch. D. 503; 59 L. J. Ch. 477; and Fleetwood *v.* Hull (1890), 23 Q. B. D. 35; 58 L. J. Q. B. 341. See also Birmingham Breweries *v.* Jameson (1898), 67 L. J. Ch. 403; 78 L. T. 512; Bryant *v.* Hancock, [1898] 1 Q. B. 716; 67 L. J. Q. B. 507; [1899] A. C. 442; 68 L. J. Q. B. 889; Manchester Brewery Co. *v.* Coombs, [1901] 2 Ch. 608; 70 L. J. Ch. 814; and Mumford *v.* Walker (1902), 71 L. J. K. B. 19; 85 L. T. 518.

severed from the ownership of the business of the lessee does not prevent the lessor or his representatives from enforcing such a covenant (*k*).

Moreover all *implied* covenants run with the land.

(2.) Assigns mentioned.

(2.) Suppose, however, that the lessee *covenants for his assigns* as well as for himself.

(a) The assignee is, of course, liable in case (b) of (1).

(b) But he is also bound in case (a) of (1), provided that what is to be done is to be done *on the demised premises* (*l*).

Clark, for instance, would have had to build the wall if Smith had covenanted for his assigns.

(c) The assignee, though expressly named, is not bound by a covenant which is merely personal or collateral to the demised premises.

Personal covenants.

"The following covenants seem to be personal covenants, so as not to bind the assignee:—A covenant by a lessor to pay on a valuation for all trees planted, or all improvements made, by the lessee during the term; to give the lessee the option of pre-emption of a piece of ground adjoining the demised premises; a covenant by lessee to pay, in addition to rent reserved, ten per cent. on the outlay which the lessor should make in improving the buildings; not to keep a beer-shop within a certain distance of the demised premises (*m*); a covenant to pay rent and repair, made *with a mortgagor* and his assigns, in a lease granted by himself together with the mortgagee; a covenant in an underlease whereby the lessor covenanted to observe, and indemnify the lessee against, the covenants in the superior lease, one of which was to build several houses on the land (*n*); and a covenant by lessee for himself, his executors and assigns, not to have persons to work in a mill to be erected on the demised premises who were settled in other parishes without a parish certificate. Where the lessee of a theatre agreed to repay money lent to him by the plaintiff on a day certain, and that until payment the plaintiff and such persons as he might appoint should have the free use of two boxes (not specified), and afterwards assigned his interest, it was held that this was a mere personal contract, and that no action could be maintained against the assignee for refusing to permit the plaintiff to use the boxes" (*o*).

(*k*) White *v.* Southend Hotel Co., *supra*.

(*l*) Bally *v.* Wells, *supra*.

(*m*) Thomas *v.* Hayward (1869), L. R. 4 Ex. 311; 38 L. J. Ex. 175.

(*n*) Doughty *v.* Bowman, *supra*; but see Martyn *v.* Clue (1852), 18 Q. B. 661; 22 L. J. Q. B. 147.

(*o*) Flight *v.* Glossop (1835), 2 Bing. N. C. 125; 2 Scott, 220; Woodf. Land. & Ten. p. 187 (17th ed.). And see Formby *v.* Barker, [1903] 2 Ch. 539; 72 L. J. Ch. 716.

Assignee indemnifies lessee.

There is an obligation implied by law on the assignee of a lease to indemnify the original lessee against breaches of covenants running with the land committed during his own tenancy, the lessee being in the position of surety to the lessor for the assignee (*p*).

Other covenants respecting land.

It is to be observed that there may be covenants respecting land between persons who do not stand to one another in the relation of landlord and tenant, and some of such covenants run with the land. It will be convenient to divide these covenants into two classes:—

With land-owner.

(1.) Covenants made by a person *with* the owner of land to do something in respect of that land.

The benefit of such a covenant (*e.g.*, for title) runs with the land, so that each successive transferee who is in of the same estate as the original covenantee was may enforce it (*q*). It would appear that the covenantor may be a mere stranger.

By land-owner.

(2.) Covenants made *by* the owner of land to do something in respect of that land.

Do not generally run with land.

Such covenants (except, perhaps, where the covenantee has some interest in the land independently of the covenant) do not run with the land. If they did, a purchaser might find himself saddled with obligations of which he was ignorant, and which would have deterred him from buying had he known of them; and the law looks with disfavour on impediments to the free circulation of property (*r*). If, however, a person takes premises with full knowledge of the existence of such a covenant, he may be bound by it (*s*); and, indeed, it is his duty to inquire into the title of his vendor or lessor (*t*). Thus, in the case of Patman *v.* Harland (*u*), it appeared

But purchasers with notice may be bound.

Patman *v.* Harland.

(*p*) Moule *v.* Garrett (1872), L. R. 7 Ex. 101; 41 L. J. Ex. 62; Wolveridge *v.* Steward (1833), 1 Cr. & M. 644; 3 M. & S. 561; but see Bonner *v.* Tottenham Building Society, [1899] 1 Q. B. 161; 68 L. J. Q. B. 114; and Johns *v.* Pink, [1900] 1 Ch. 296; 69 L. J. Ch. 98.

(*q*) Kingdon *v.* Nottle (1815), 4 M. & S. 53; 16 R. R. 379; and see Sharp *v.* Waterhouse (1857), 7 E. & B. 816; 3 Jur. N. S. 1022; Rowell *v.* Satchell, [1903] 2 K. B. 212.

(*r*) Keppell *v.* Bailey (1834), 2 My. & K. 517; 39 R. R. 264.

(*s*) Tulk *v.* Moxhay (1848), 2 Ph. 774; Luker *v.* Dennis (1877), 7 Ch. Div. 227; 47 L. J. Ch. 174; Spencer *v.* Bailey (1893), 69 L. T. 179.

(*t*) Wilson *v.* Hart (1866), L. R. 1 Ch. 463; 35 L. J. Ch. 569; and see Thornewell *v.* Johnson (1881), 50 L. J. Ch. 641; 44 L. T. 768; Nottingham Patent Brick and Tile Co. *v.* Butler (1886), 16 Q. B. D. 778; 55 L. J. Q. B. 280; *In re* Birmingham and District Land Co. and Allday, [1893] 1 Ch. 342; 62 L. J. Ch. 90; Davis *v.* Leicester Corporation, [1894] 2 Ch. 208; 63 L. J. Ch. 440; Groves *v.* Loomes (1885), 55 L. J. Ch. 52; 53 L. T. 592; Brown *v.* Inskip (1884), 1 C. & E. 231.

(*u*) (1881), 17 Ch. D. 353; 50 L. J. Ch. 642. As to when a covenant to erect "not more than one house" is broken by the erection of a block of residential flats,

that in 1876 a conveyance in fee of building land at Wimbledon had been made to a purchaser subject to a covenant against erecting on the land anything except a *private house*. The land was afterwards leased, and the lessee put up a corrugated iron building as an *art studio for ladies*. In an action by the original vendor against the lessee it was held that any representations by the lessor to the lessee that there was no restrictive covenant did not protect the lessee from being affected with constructive notice of the lessor's title, and that a purchaser who has notice of a deed necessarily affecting the vendor's title has notice of the contents of the deed. It was also held that the doctrine that a lessee has constructive notice of his lessor's title is not altered by the Vendor and Purchaser Act, 1874 (*x*), but a lessee who is within that Act is in the same position as if he had contracted not to look into his lessor's title.

Doctrines not to be extended too far.

The case of Haywood *v.* The Brunswick Permanent Benefit Building Society (*y*), however, shows that these doctrines are not to be pushed too far. A plot of ground was conveyed subject to a rent-charge, the grantee for himself, his heirs, executors, and assigns, covenanting with the grantor, his heirs and assigns, that he, the grantee, his heirs or assigns, "will erect, within two years from the date of these presents, and at all times thereafter keep in good and tenantable repair and condition, and from time to time, when necessary, will rebuild upon the said plot of land such good and substantial messuages or other buildings as shall be of the annual letting value of at least double the amount of rent-charge limited in respect of such plot." In an action by the assignee of the grantor against mortgagees in possession to an assignee of the grantee for breach of this covenant, it was held that the covenant did not run with the land so as to make the defendants liable at common law, and that it was not a covenant which could be enforced in equity against assignees with notice. "It strikes me," said Lindley, L. J., "that this is an attempt to extend the doctrine of Tulk *v.* Moxhay too far." See, however, the later cases of Collins *v.* Castle (1887), 36 Ch. D. 243; 57 L. J. Ch. 76; Tucker *v.* Vowles, [1893] 1 Ch. 195; 62 L. J. Ch. 172; Tindall *v.* Castle (1893), 62 L. J. Ch. 555; 3 R. 418; Meredith *v.* Wilson (1893), 69 L. T. 336.

The following cases on this subject may be referred to:—Sayers

see and compare the recent cases of Rogers *v.* Hosegood, [1900] 2 Ch. 388; 69 L. J. Ch. 652; Kimber *v.* Admans, [1900] 1 Ch. 412; 69 L. J. Ch. 296; and Formby *v.* Barker, [1903] 2 Ch. 539; 72 L. J. Ch. 716.

(*x*) 37 & 38 Vict. c. 78, s. 2.

(*y*) (1882), 8 Q. B. D. 403; 51 L. J. Q. B. 73.

v. Collyer (1884), 28 Ch. D. 103; 54 L. J. Ch. 1; L. C. & D. Ry. Co. *v.* Bull (1882), 47 L. T. 413; Austerberry *v.* Corporation of Oldham (1885), 29 Ch. D. 750; 55 L. J. Ch. 633; Everett *v.* Remington, [1892] 3 Ch. 148; 61 L. J. Ch. 574; Osborne *v.* Bradley, [1903] 2 Ch. 446.

Holloway *v.* Hill.

It should, however, be observed, that a bargain against a particular user of land retained on the sale or lease of part of an estate may be enforced by any person entitled in equity to the benefit of the bargain against any person bound in equity by notice of it, either express or to be imputed at the time of acquisition of his own title. This right does not depend upon the existence of a covenant running with the land or of any right to relief under the common law (*z*).

Restrictive covenants.

As to how far a restrictive covenant justifies a vendee in claiming a declaration that the vendor has not shown a good title, the case of *In re* Higgins and Hitchman's Contract (1882), 21 Ch. D. 95; 51 L. J. Ch. 772, may be consulted. There, on the sale of a villa at St. Leonards, the vendor agreeing to deduce a good title, it appeared that the vendor's predecessor in title had covenanted not to use the premises as gasworks or a public-house. It was held that this covenant constituted a fatal objection to the title, although the respectability of the neighbourhood made it extremely unlikely that anybody would ever want to convert the villa into gasworks or a public-house.

Tenants in common.

An action may be maintained by one tenant in common of a reversion for breach of a covenant running with the land, without joinder of his co-tenants in common as plaintiffs, where the severance of the reversion takes place after the demise. Roberts *v.* Holland, [1893] 1 Q. B. 665; 62 L. J. Q. B. 621.

(*z*) See Holloway *v.* Hill, [1902] 2 Ch. 612; 71 L. J. Ch. 818, where the authorities on the subject are reviewed; Kemp *v.* Bird (1877), 5 Ch. D. 549; 46 L. J. Ch. 828, is not inconsistent with Fitz *v.* Iles, [1893] 1 Ch. 77; 62 L. J. Ch. 258. See also Ashby *v.* Wilson, [1900] 1 Ch. 66; 69 L. J. Ch. 47.

Assignment of Choses in Action.

[90] BRICE *v.* BANNISTER. (1878)

[3 Q. B. D. 569; 47 L. J. Q. B. 722.]

Gough agreed to build a ship for Bannister for £1,375. After this agreement had been entered into, Gough gave one of his creditors, Brice, solicitor, of Bridgwater, the following order, addressed to Bannister:—

"*I do hereby order, authorise, and request you to pay to Mr. William Brice, solicitor, Bridgwater, the sum of* £100 *out of money due or to become due from you to me, and his receipt for same shall be a good discharge.*"

Directly Brice received this order, he gave notice of it to Bannister in the following terms:—

"*I hereby give you notice that by a memorandum in writing dated the 27th of October*, 1876, *John Gough, of this place, authorised and requested you to pay me the sum of* £100 *out of money due or to become due from you to him, and my receipt for the same shall be a good discharge.*"

Bannister seems to have thought that, as he had had nothing to do with this arrangement between Gough and Brice, it did not in any way concern him, and, in spite of the notice, paid the whole of the money for the ship to Gough.

This was an action by Brice, and it was held by the Court of Appeal (Brett, L. J., dissenting) that the instrument in writing constituted a valid equitable assignment of the £100. "It does seem to me," said Bramwell, L. J., "a strange thing, and hard on a man, that he should enter into a contract with another, and then find that, because that other has entered into a contract with a third, he, the

first man, is unable to do that which is reasonable and just he should do for his own good. But the law seems to be so: and *anyone who enters into a contract with A. must do so with the understanding that B. may be the person with whom he will have to reckon.*"

Chose in action not assignable at common law.

Previously to 1873—with exceptions, however, in favour of bills of exchange, and life or marine policies (*a*)—a chose in action could not be effectively assigned at law, though it could in equity. But the Judicature Act, 1873, provides (*b*) that—

Judicature Act, 1873.

Any ABSOLUTE ASSIGNMENT, *by writing under the hand of the assignor (not purporting to be by way of charge only), of any debt or other legal chose in action, of which express notice in writing shall have been given to the debtor, trustee, or other person from whom the assignor would have been entitled to receive or claim such debt or chose in action, shall be, and be deemed to have been effectual in law (subject to all equities which would have been entitled to priority over the right of the assignee if this Act had not passed) to pass and transfer the legal right to such debt or chose in action from the date of such notice, and all legal and other remedies for the same, and the power to give a good discharge for the same, without the concurrence of the assignor: Provided always, that if the debtor, trustee, or other person liable in respect of such debt or chose in action shall have had notice that such assignment is disputed by the assignor or anyone claiming under him, or of any other opposing or conflicting claims to such debt or chose in action, he shall be entitled, if he think fit, to call upon the several persons making claim thereto to interplead concerning the same, or he may, if he think fit, pay the same into the High Court of Justice under and in conformity with the provisions of the Acts for the relief of trustees* (*c*).

Durham *v.* Robertson.

It should be observed that the leading case was decided on the ground that the transaction amounted to a valid equitable assignment, and not that it was an "absolute assignment" within the meaning of the above section. This was clearly pointed out in the recent case of Durham *v.* Robertson (*d*), where the judgment of

(*a*) See 30 & 31 Vict. c. 144, and 31 & 32 Vict. c. 86; 3 & 4 Anne, c. 9. As to the assignment of life policies, see *ante*, p. 261.

(*b*) Sect. 25, sub-sect. (6).

(*c*) There cannot be a valid assignment under this section of an *unascertained part of a debt*. Jones *v.* Humphreys, [1902] 1 K. B. 10; 71 L. J. K. B. 23. This section is retrospective, and applies to assignments made before the Act came into operation. Dibb *v.* Walker, [1893] 2 Ch. 429; 68 L. T. 610.

(*d*) [1898] 1 Q. B. 765; 67 L. J. Q. B. 484. See also Comfort *v.* Betts, [1891] 1 Q. B. 737; 60 L. J.

Lord Coleridge, C. J., in the leading case was questioned. A firm of builders delivered to the plaintiffs a document in the following terms:—

> "*Re* Building Contract, South Lambeth Road.—In consideration of money advanced from time to time, we hereby charge the sum of £1,080, which will become due to us from John Robertson on the completion of the above buildings, as security for the advances, and we hereby assign our interest in the above-mentioned sum until the money with added interest be paid to you."

The plaintiffs gave notice to the John Robertson named in the document, and brought an action against him to recover the amount. The Court of Appeal held that this document did not constitute an "absolute assignment" within sect. 25, sub-sect. 6, of the Judicature Act, 1873, but only a conditional assignment, inasmuch as, although it was a valid equitable assignment, yet it was by way of security only, and without power to give a valid discharge to the debtor; and consequently the plaintiffs were not entitled to sue upon it. This case may usefully be compared with

Hughes *v.* Pump House Hotel Co.

that of Hughes *v.* Pump House Hotel Co. (No. 1) (*e*). The plaintiff, a builder, who had entered into a building contract with the defendants, executed an assignment in the following terms in favour of his bankers:—"In consideration of your continuing a banking account with me . . . . and by way of continuing security to you for all moneys due or to become due to you from me . . . . I hereby assign to you all moneys due or to become due to me from [the defendants] under or by virtue [of the said building contract]. And I hereby empower you on my behalf and in my name to settle and adjust all accounts in connection with the works and matters aforesaid, to give effectual receipts for the moneys hereby assigned . . . . also, if necessary, to sue for or take such other steps as you may think necessary for enforcing payment of the moneys hereby assigned . . . ." It was held by the Court of Appeal that this was an "absolute assignment" within sect. 25, and that, therefore, the plaintiff was not entitled to sue the defendants in respect of a balance alleged to be due to him under the building contract.

Assignor reserving rights.

In the case of National Provincial Bank *v.* Harle (*f*), where the

Q. B. 656; and *In re* Jones, *Ex parte* Nichols (1883), 22 Ch. D. 782; 52 L. J. Ch. 625, where it was held that a trader cannot assign the future receipts of his business as against the trustee in his bankruptcy.

(*e*) [1902] 2 K. B. 190; 71 L. J. K. B. 630.

(*f*) (1881), 6 Q. B. D. 626; 50 L. J. Q. B. 437.

mortgagee of some premises had assigned to his bankers, as security for the balance of his banking account, the sum due on the mortgage deed, *subject to his right to have an account and for the reconveyance of the premises on certain conditions*, it was held that the assignment was not absolute but only "by way of charge." This case, however, was disapproved in the case of Tancred *v.* Delagoa Bay Co. (*g*), where it was held that a mortgage of debts due to the mortgagor, made in the ordinary form with a proviso for redemption and reconveyance upon repayment to the mortgagee, was "an absolute assignment (not purporting to be by way of charge only)" within the above section of the Judicature Act. Tancred *v.* Delagoa Bay Co.

In another case (*h*) the plaintiffs had sub-let a portion of premises in Baker Street, of which they had a lease, to the defendant. They afterwards assigned their interest in the premises to a person named Burrows, agreeing with him in writing that, notwithstanding the assignment, they should receive the rent due from the defendant for the remainder of her lease; and notice of this agreement was given to the defendant. The defendant afterwards surrendered her lease to Burrows, and in an action for rent claimed as accruing after the surrender it was held that, even if there was a valid assignment of a chose in action, still that the plaintiffs could not recover, for that *the assignment was of rent to become due, whereas no rent had accrued due after the surrender*, and the defendant could not be prevented by the agreement between the plaintiffs and Burrows from surrendering her lease to Burrows. It seems to be doubtful, however, whether there was in this case any valid assignment within the sub-section. Assignment of rent not yet due.

In Burlinson *v.* Hall (*i*) debts had been assigned by deed to the plaintiff upon trust that he should receive them, and out of them pay himself a sum due to him from the assignor, and pay the surplus to the assignor. It was held that this was an "absolute assignment (not purporting to be by way of charge only)," and that the plaintiff might sue in his own name for the debts. Burlinson *v.* Hall.

And in the case of Comfort *v.* Betts (*k*), a deed was executed by creditors of the defendant, by which, after recital of an agreement that their debts should be assigned to the plaintiff on the Comfort *v.* Betts.

(*g*) (1889), 23 Q. B. D. 239; 58 L. J. Q. B. 459; and see Comfort *v.* Betts, [1891] 1 Q. B. 737; 60 L. J. Q. B. 656; and Mercantile Bank of London *v.* Evans, [1899] 2 Q. B. 613; 68 L. J. Q. B. 921.

(*h*) Southwell *v.* Scotter (1880), 49 L. J. Ex. 356; 44 J. P. 376.

(*i*) (1884), 12 Q. B. D. 347; 53 L. J. Q. B. 222; but see the later case of Tancred *v.* Delagoa Bay Co. (1889), *supra*.

(*k*) [1891] 1 Q. B. 737; 60 L. J. Q. B. 656; but see Mercantile Bank of London *v.* Evans, *supra*.

terms that he should proceed to recover the same, and pay to them respectively, out of the aggregate amount recovered, such proportionate part thereof as should represent the individual debt due to them respectively, or such part thereof as might have been recovered, it was witnessed that they assigned their respective debts to the plaintiff, to hold the same absolutely, and the Court held that such deed was an "absolute assignment" within the meaning of the above section. And this case was followed by the Court of Appeal in Wiesener *v.* Rackow (*l*), where a foreigner resident abroad assigned to the plaintiff a debt, due to him from the defendant, by a deed which purported, in consideration of £50 paid by the plaintiff, to absolutely assign the debt. In fact the assignment was made to the plaintiff in order to enable him to sue in England in his own name to recover the debt for the benefit of the assignor, and the plaintiff had not paid any sum by way of consideration to the assignor. It was held that the assignment was "absolute," so as to entitle the plaintiff to sue in his own name.

Wiesener *v.* Rackow.

Palmer *v.* Culverwell.

A. being the debtor of B. and the creditor of C. instructed his solicitors, who were suing C., to hold the proceeds at the disposal of B. Subsequently A. called his creditors together, and a deed of assignment was executed by B. with the other creditors. The solicitors received part of the money due from C. before the execution of the deed by B., and the remainder afterwards. The deed contained a clause that it was not to prejudice the rights of creditors in respect of securities held against any person but the debtor. Bruce, J., held that this was a good equitable assignment of the whole of the proceeds of the debt of C., and that B. was entitled as against the trustee of the deed (*m*).

Western Wagon Co. *v.* West.

Reference may also be made to the case of Western Wagon Co. *v.* West (*n*). There P. mortgaged freehold property to the defendants, to secure £7,500, and further advances up to £10,000, which the defendants contracted to make. P. made a second mortgage of the same property to the plaintiffs to secure £1,000, and further advances up to £2,500, and assigned to them his right, under the contract in the first mortgage, to call for and require payment from the defendants of the further advances therein mentioned, and the full benefit of the contract. The plaintiffs gave notice of this assignment to the defendants, but, notwithstanding

(*l*) (1897), 76 L. T. 448.

(*m*) Palmer *v.* Culverwell (1902), 85 L. T. 758.

(*n*) [1892] 1 Ch. 271; 61 L. J. Ch. 244; and see May *v.* Lane (1894), 64 L. J. Q. B. 236; 71 L. T. 869, where it was held that a right, under a contract, to a loan is not a legal debt or *chose in action* so as to be assignable under sect. 25, subsect. (6), of the Judicature Act, 1873.

the notice, the defendants subsequently made a further advance of £500 to P. The plaintiffs thereupon brought an action to recover from the defendants personally the sum of £500 so paid by them to P., or damages for breach of contract. But it was held that no money or fund was bound by the contract to make further advances, which created no debt, and that, on this ground, Brice *v.* Bannister was distinguishable and did not apply. It was also held that, whether the assignment did or did not fall within sect. 25, sub-s. (6), of the Judicature Act, 1873, the plaintiffs could not sue for damages in their own right, but only in the right of their assignor P. who, on the facts, had sustained no damage, and that on this point also the plaintiffs' claim failed.

Negotiable instrument given for debt.

Notice to a debtor, who has given a negotiable instrument for his debt, that the debt has been assigned by the creditor, can be disregarded by the debtor, even if the creditor who has assigned the debt is still the holder of the negotiable instrument (*o*).

Agreements of a personal nature.

Agreements of a personal nature cannot generally be assigned; for instance, when an agreement requires on the part of a manufacturer a certain amount of skill, knowledge, and supervision in its performance, the work agreed to be done not being capable of being performed by everyone, it is of a personal nature, and therefore not assignable (*p*). Another illustration of this rule is to be found in the recent case of Griffith *v.* Tower Publishing Co. (*q*), where it was held that the rule that a publishing agreement between an author and an individual publisher or firm of individuals, is of such a personal nature that the benefit of it cannot, without the consent of the author, be assigned, extends to such an agreement between an author and a limited company.

Portland Cement Co.'s case.

An important decision on this subject is to be found in the recent case of Tolhurst *v.* Associated Portland Cement Manufacturers (*r*). The owner of chalk quarries undertook to supply a company with 750 tons of chalk per week, and so much more, if any, as the company should require for the whole of their manufacture of cement upon their land, at 1*s.* 3*d.* per ton, and to provide all rolling stock, stipulating that the agreement should not preclude him from supplying chalk from his quarries to other persons. Subsequently the company conveyed and assigned their land, works, and

(*o*) Bruce *v.* Shearman, [1898] 2 Ch. 582; 67 L. J. Ch. 513.

(*p*) Jaeger's Sanitary Woollen Co. *v.* Walker (1897), 77 L. T. 180. See also Robson *v.* Drummond (1831), 2 B. & Ad. 303; 9 L. J. K. B. 187; and Boulton *v.* Jones (1857), 2 H. & N. 564; 27 L. J. Ex. 117.

(*q*) [1897] 1 Ch. 21; 66 L. J. Ch. 12.

(*r*) [1903] A. C. 414; 72 L. J. K. B. 834; and see [1902] 2 K. B. 660; 71 L. J. K. B. 949.

business, and purported to assign the benefit of the agreement to a new company having a much larger manufacture, giving notice of the conveyance and assignment to the owner of the quarries. The House of Lords held that the contract was assignable and that an action could be maintained by the new company against the owner of the quarries for breach of the agreement to supply chalk.

Other cases.

Other cases on the subject that may usefully be referred to are Buck *v.* Robson (1878), 3 Q. B. D. 686; 48 L. J. Q. B. 250; Young *v.* Kitchen, 3 Ex. D. 127; 47 L. J. Ex. 579; *Re* Sutton's Trusts (1879), 12 Ch. D. 175; Schroeder *v.* Cent. Bank of London (1876), 34 L. T. 735; 24 W. R. 710; British Waggon Co. *v.* Lea (1880), 5 Q. B. D. 149; 49 L. J. Q. B. 321; *Re* Tritton, *Ex parte* Singleton (1889), 61 L. T. 301; 6 M. B. R. 250; Colonial Bank *v.* Whinney (1886), 11 App. Cas. 426; 56 L. J. Ch. 43; Gason *v.* Rich (1887), 19 L. R. Ir. 391; Manchester Brewery Co. *v.* Coombs, [1901] 2 Ch. 608; 70 L. J. Ch. 814; Marchant *v.* Morton, [1901] 2 K. B. 829; 70 L. J. K. B. 820.

Mortgages.

It seems that under the Conveyancing Act, 1881, the transferee of a statutory mortgage may sue on it in his own name (*s*).

Novation.

Novation may be just mentioned here. It occurs where a third party undertakes the liability of the contract, and is accepted by the creditor in substitution for the original contractor (*t*). This mode of discharge receives its commonest illustration in the acceptance by policy holders of the transfer of their policies, and in changes in firms of partners.

(*s*) 44 & 45 Vict. c. 41, s. 27.

(*t*) "Præterea novatione tollitur obligatio. Veluti si id quod tu Seio debeas, a Titio dari stipulatus sit. Nam interventu novæ personæ nova nascitur obligatio, et prima tollitur translata in posteriorem." Just. Inst. 3, 29, 3.

DISCHARGE.

Accord and Satisfaction.

CUMBER *v.* WANE. (1719) [91]

[1 STRANGE, 426.]

WANE owed Cumber £15, and wondered how he should pay it. In a genial moment Cumber rejoiced his debtor's heart by telling him that if he paid £5 it would do. Wane thanked him, sat down quickly, and wrote out his promissory note for that amount. But after a while it repented Cumber of his generosity, and he went to law for the whole £15. Wane pleaded that the plaintiff had agreed to accept £5 in full satisfaction for the debt of £15, and that he had paid the £5. Though perfectly true, this was not considered a satisfactory plea, and Wane was compelled to pay the remaining £10.

Principle of leading case.

The principle on which Cumber *v.* Wane proceeds is that there is *no consideration* for the relinquishment of the residue; but whenever there is a benefit, or legal possibility of a benefit, to the creditor, the doctrine that the payment of a smaller sum is no satisfaction of a larger one does not apply. Therefore—

Different kinds.

(1.) The payment of something of a different nature, though of less value, *e.g.*, an old arm-chair (which may have a fancy value quite apart from its intrinsic usefulness), may be pleaded in satisfaction of a debt of £10,000. So a *negotiable instrument*—by the way, it must be taken that in Cumber *v.* Wane the note was *not* negotiable—for £5 might successfully be pleaded in satisfaction

of a debt of £15 (*a*). In the case of Goddard *v.* O'Brien (*b*) this point, which had formerly been regarded as doubtful, was established beyond question.

Payment earlier or at different place.

(2.) So may a payment, smaller indeed, but *earlier* than originally stipulated for, or made at a *different place*. *Bis dat qui cito dat* (*c*).

Dispute.

(3.) So when there is a *dispute* as to the exact sum due (*d*).

Unliquidated damages.

(4.) The doctrine does not apply to *unliquidated damages*, for it is not known what is really due to the plaintiff. Railway companies occasionally succeed in entrapping their victims into agreements of this kind. In such a case the question for the jury is whether the plaintiff's mind went with the terms of the paper he signed (*e*).

Composition with creditors.

(5.) Under the Bankruptcy Act, 1890, a debtor may be discharged from obligations by his creditors accepting a composition (*f*).

Receipt under seal.

It is to be observed that a smaller sum may be pleaded in satisfaction of a greater if there is a *receipt under seal* (*g*). Moreover, payment of part may sometimes be *evidence of a gift* of the remainder; or, again, there may be a remedy by way of set-off or counter-claim.

Husband and wife.

Where a husband and wife are living apart under a deed of separation, and the husband has made default in payment of instalments due to the wife under the deed, a resumption of cohabitation subsequent to such default does not of itself amount to accord and satisfaction of the cause of action which has already accrued to the wife in respect of the arrears of the instalments (*h*).

To be a good discharge, *an accord must be executed* (*i*), unless, indeed, the jury find that what the plaintiff accepted in satisfaction was not the *performance*, but the *promise* (*k*).

Day *v.* McLea.

In Day *v.* McLea (*l*), the plaintiffs claimed a sum of money for damages for breach of contract, and the defendants sent a cheque for a less amount, with a form of receipt "in full of all demand."

(*a*) Sibree *v.* Tripp (1846), 15 M. & W. 23; 15 L. J. Ex. 318.

(*b*) (1882), 9 Q. B. D. 37; 46 L. T. 306.

(*c*) Pinnel's case (1602), 5 Co. 117.

(*d*) Cooper *v.* Parker (1855), 15 C. B. 822; 24 L. J. C. P. 68.

(*e*) Rideal *v.* G. W. Ry. Co. (1859), 1 F. & F. 706; and see Lee *v.* Lanc. & Yorks. Ry. Co. (1871), L. R. 6 Ch. 527; 25 L. T. 77; and Ellen *v.* G. N. Ry. Co. (1902), 49 W. R. 395.

(*f*) 53 & 54 Vict. c. 71, s. 3.

(*g*) Fitch *v.* Sutton (1804), 5 East, 230.

(*h*) Macan *v.* Macan (1902), 70 L. J. K. B. 90.

(*i*) Edwards *v.* Chapman (1836), 1 M. & W. 231; 4 D. C. P. 732.

(*k*) Hall *v.* Flockton (1851), 16 Q. B. 1039; 20 L. J. Q. B. 201; and Evans *v.* Powis (1847), 1 Ex. 601; 11 Jur. 1043.

(*l*) (1889), 22 Q. B. D. 610; 58 L. J. Q. B. 293.

The plaintiffs kept the cheque and sent a receipt on account, and sued for the balance of their claim. The Court of Appeal held that keeping the cheque was not, as a matter of law, conclusive that there was an accord and satisfaction of the claim, but that it was a *question of fact on what terms the cheque was kept.*

Accord and satisfaction made *by a stranger* on behalf of the defendant, and adopted by the plaintiff, is a good defence (*m*).

To an action by several joint creditors accord and satisfaction with any one of them, without the necessity of showing that he had authority from the rest to settle, is an answer (*n*). And so accord and satisfaction made by one of several parties jointly liable discharges all (*o*).

Beer *v.* Foakes.

In Beer *v.* Foakes (*p*), the principle of Pinnel's case and Cumber *v.* Wane was discussed. Judgment for a specific sum having been obtained by the plaintiff in an action, an agreement in writing was made between the plaintiff and the defendant whereby, in consideration that the defendant would pay part of the sum on the signing of the agreement, and the remainder to the plaintiff or her nominee by equal half-yearly instalments, the plaintiff undertook not to take any proceedings on the judgment. The defendant duly performed all the terms of the agreement on his part, but it was held that the agreement was not binding on the plaintiff, there being no consideration for it, and that therefore the plaintiff was entitled to issue execution for interest on the judgment debt.

At common law accord and satisfaction could not be pleaded in answer to an action on specialty, but this was not the rule at equity, and now, the latter view prevailing, accord and satisfaction is a good defence to an action on a deed (*q*).

Second point of leading case.

A point of practice decided in the leading case was that *if one party die during a curia advisari vult, judgment may be entered nunc*

(*m*) Jones *v.* Broadhurst (1850), 9 C. B. 173; Randall *v.* Moon (1852), 12 C. B. 261; 21 L. J. C. P. 226. See also Cook *v.* Lister (1863), 13 C. B. N. S. 543; 32 L. J. C. P. 121.

(*n*) Wallace *v.* Kelsall (1840), 7 M. & W. 264; 4 Jur. 1064. See also Steeds *v.* Steeds (1889), 22 Q. B. D. 537; 58 L. J. Q. B. 302.

(*o*) Nicholson *v.* Revill (1836), 4 A. & E. 675; 6 N. & M. 192; and see *In re* E. W. A., [1901] 2 K. B. 642; 70 L. J. K. B. 810; distinguishing *In re* Armitage, *Ex parte* Good (1877), 5 Ch. D. 46; 46 L. J. Bk. 65.

(*p*) (1884), 9 App. Cas. 605; 54 L. J. Q. B. 130. This case was *distinguished* in Bidder *v.* Bridges (1887), 37 Ch. D. 406; 57 L. J. Ch. 300; and *followed* in Underwood *v.* Underwood, [1894] P. 204; 63 L. J. P. 109, where a promise to release arrears and future payments of alimony was held not to be supported by a consideration of a sum less than the arrears.

(*q*) See Steeds *v.* Steeds, *supra.*

pro tunc. This is on the principle, *Actus curiæ nemini facit injuriam* (*r*). See also Ackroyd *v.* Smithies (1885), 54 L. T. 130; 50 J. P. 358.

Tender.

[92] **FINCH *v.* BROOK.** (1834)

[1 Bing. N. C. 253; 2 Scott, 511.]

Money disputes having arisen between Finch and Brook, and litigation being imminent, Brook sent his attorney to Finch to pay what he believed to be the amount of his debt. Accordingly, Brook's attorney called on the creditor, and said, "I am come, Mr. Finch, to pay you the £1 12*s.* 5*d.* which Mr. Brook owes you," whereupon he put his hand into his pocket to come at the coin. Finch, however, testily replied, "I can't take it, the matter is now in the hands of my attorney," and so the lawyer took his hand out of his pocket again without producing the money. The question was whether this constituted a valid tender, and it was held that it did *not*, for there was *neither production of the money nor dispensation with production* (*s*).

Production dispensed with.

The reason why the law attaches so much importance to the production of the money is that "the sight of it may tempt the creditor to yield." A tender, however, is valid, though there is no production, *if the creditor dispenses with it;* as, for instance, where a debtor called on his creditor and said he had £8 18*s.* 6*d.* in his pocket to pay the debt with, whereupon the creditor exclaimed, "*You needn't give yourself the trouble of offering it, for I'm not going to take it*" (*t*). But Lord Tenterden, C. J., thought there was not

(*r*) See Turner *v.* L. & S. W. Ry. Co. (1874), L. R. 17 Eq. 561; 43 L. J. Ch. 430.

(*s*) The Court, however, seems to have thought that, if the jury had chosen to do so, they might very well have inferred dispensation.

(*t*) Douglas *v.* Patrick (1790), 3 T. R. 638; 1 R. R. 793.

a sufficient tender where the production of the money was prevented by the creditor leaving the room after the debtor had offered to pay it, and whilst he was in the act of taking it from his pocket (*u*).

Unconditional.

A valid tender must be *unconditional*. "*If you will give me a stamped receipt, I will pay you the money*," said a debtor once, and he pulled out the money as he spoke. But the tender was held bad for the condition (*x*). A tender made "*under protest*" is not a conditional tender (*y*).

To or by agent.

The tender need not be made to the creditor himself. It *may be made to an agent* authorized to receive payment of the debt (*z*). Conversely, the tender may be made by an agent of the debtor (*a*). And so tender to one of several joint creditors, or by one of several joint debtors, is good.

It has been held (*b*) that a solicitor who is authorized to accept a tender of mortgage money on behalf of his client is not at liberty to accept the tender of a cheque in lieu of cash, so as to make such a tender good in law as against the mortgagee.

Whole debt.

The tender must be *of the whole debt*. But if the creditor's claim consists of a number of distinct items, the debtor may make a good tender of payment of any one of them, provided that he carefully specifies the particular item he wishes to dispose of (*c*). A tender may, of course, be made of a larger sum of money than the amount of the debt (*d*), but the debtor must not demand change (*e*); if, however, the creditor does not object to the tender *on that account*, but for some collateral reason, such as a demand for a larger sum, the tender will be good (*f*).

Current coin.

The tender must be *in the current coin of the realm*. Gold is good to any amount, but silver is not beyond 40*s*., nor copper beyond a shilling (*g*). A Bank of England note payable to bearer is a legal

(*u*) Leatherdale *v.* Sweepstone (1828), 3 C. & P. 342; 33 R. R. 678.

(*x*) Laing *v.* Meader (1824), 1 C. & P. 257. See, however, Richardson *v.* Jackson (1841), 8 M. & W. 298; 9 D. P. C. 715.

(*y*) Scott *v.* Uxbridge and Rickmansworth Ry. Co. (1866), L. R. 1 C. P. 596; 3 L. J. C. P. 293; Greenwood *v.* Sutcliffe, [1892] 1 Ch. 1; 61 L. J. Ch. 59.

(*z*) Moffat *v.* Parsons (1814), 5 Taunt. 307; 1 Marsh. 55; and see Finch *v.* Boning (1879), 4 C. P. D. 143; 40 L. T. 484.

(*a*) Read *v.* Goldring (1813), 2 M. & S. 86; 14 R. R. 594.

(*b*) Blumberg *v.* Life Interests, &c. Corporation, [1897] 1 Ch. 171; 66 L. J. Ch. 127; affirmed, [1898] 1 Ch. 27; 67 L. J. Ch. 118.

(*c*) Strong *v.* Harvey (1825), 3 Bing. 304; 11 Moore, 72; and Hardingham *v.* Allen (1848), 5 C. B. 793; 17 L. J. C. P. 198.

(*d*) Dean *v.* James (1833), 4 B. & Ad. 546; 1 N. & M. 303.

(*e*) Betterbee *v.* Davis (1811), 3 Camp. 70; 13 R. R. 755.

(*f*) Per Lord Abinger, C. B., in Bevans *v.* Rees (1839), 5 M. & W. 306; 3 Jur. 608.

(*g*) 33 Vict. c. 10, s. 4.

tender for all sums above £5 (*h*). A tender in country notes or by cheque is good if the only reason given by the creditor at the time for not accepting it is that the amount of the debt is larger (*i*).

Debt not extinguished.

It is scarcely necessary to say that the effect of a valid tender is not to extinguish the debt. On the contrary, it is *an admission* of the contract. But what it does is to put the plaintiff in the wrong so far as his action is concerned. He is exposed as the litigious oppressor, while the defendant stands forth as the virtuous citizen who has all along been ready and anxious to discharge his liabilities (*k*). Accordingly, a valid tender stops the further accrual of interest (*l*), and extinguishes the right of lien, whether of an unpaid vendor in possession of goods sold, or a manufacturer or workman in possession of goods that have been worked up or repaired by him, or a pledgee holding chattels as a security for a debt (*m*). But the plea of tender must be accompanied by payment into Court of the money tendered (*n*).

Alteration of Terms between Creditor and Debtor releases Surety.

[93] WHITCHER *v.* HALL. (1826)

[5 B. & C. 269; 8 D. & R. 22.]

Whitcher agreed to let Joseph Hall have thirty cows for milking at £7 10*s.* each per annum, and James Hall became surety for the due payment of the money. By-and-by some of the cows died, and the terms of the letting were changed so that Joseph was to have the milking of

(*h*) 3 & 4 Will. 4, c. 98, s. 6.

(*i*) Polglass *v.* Oliver (1831), 2 C. & J. 15; 2 Tyr. 89.

(*k*) *Per cur.* in Dixon *v.* Clarke (1848), 5 C. B. 365; 16 L. J. C. P. 237.

(*l*) Dent *v.* Dunn (1812), 3 Camp. 296; 13 R. R. 809.

(*m*) Ratcliff *v.* Davies, Cro. Jac. 244; Chilton *v.* Carrington (1855), 24 L. J. C. P. 10; 16 C. B. 206; but in cases of mortgage, see Bank of New South Wales *v.* O'Connor (1889), 14 App. Cas. 273; 58 L. J. P. C. 82.

(*n*) R. S. C., Ord. 22, r. 3; County Court Rules, Ord. 10, r. 20. See Griffiths *v.* School Board of Ystradyfodwg (1890), 24 Q. B. D. 307; 59 L. J. Q. B. 116.

twenty-eight cows during one part of the year and of thirty-two during the other. James was not consulted on the subject; and, indeed, it is difficult to see that the alteration in any way prejudiced him. But although there was thus no substantial alteration of the original terms, yet the Court considered that an alteration *was* an alteration, and that James Hall was thereby released from his suretyship.

It may be added that from this opinion Mr. Justice Littledale dissented, citing the maxim *de minimis non curat lex*, by which he meant that the alterations were so trifling as to be not worth considering.

The man who is kind enough to become surety for a friend undertakes a very thankless office; and the law is jealously anxious to shield him against fraud and imposition. Whitcher *v.* Hall well illustrates the rule that any alteration of the terms of the original agreement by the creditor and the debtor behind the surety's back, will exonerate the surety, unless the rights against him are expressly reserved (*o*).

Ellesmere Brewery Co. *v.* Cooper.

And another good illustration of the principle of the leading case is to be found in the recent case of Ellesmere Brewery Co. *v.* Cooper (*p*). Four persons, as sureties for a principal, executed a joint and several bond of suretyship, by the terms of which the liability of two of them was limited to £50 each, and that of the other two to £25 each. One of these, whose liability was limited to £50, after the other three had executed the bond, executed it himself, but added to his signature the words "£25 only." The obligee accepted the bond so executed without objection, and subsequently the principal became in default. It was held that the effect of the added words was to make a material alteration in the bond, so that the three first signatories were thereby discharged from their obligation; and that, as the last signatory only executed the bond as a joint and several bond, he also was not bound by it.

The law on the subject was summed up by Cotton, L. J., as follows:—

True rule stated by

"The true rule, in my opinion, is that if there is any agreement

(*o*) Kearsley *v.* Cole (1846), 16 M. & W. 128; 16 L. J. Ex. 115; Price *v.* Barker (1855), 24 L. J. Q. B. 130; 4 E. & B. 760.

(*p*) [1896] 1 Q. B. 75; 65 L. J. Q. B. 173.

Cotton, L. J.

between the principals with reference to the contract guaranteed, the surety ought to be consulted, and that if he has not consented to the alteration, although in cases where it is without inquiry evident that the alteration is unsubstantial, or that it cannot be otherwise than beneficial to the surety, the surety may not be discharged; yet that *if it is not self-evident that the alteration is unsubstantial, or one which cannot be prejudicial to the surety*, the Court will not, in an action against the surety, go into an inquiry as to the effect of the alteration, or allow the question whether the surety is discharged or not to be determined by the finding of a jury as to the materiality of the alteration, or on the question whether it is to the prejudice of the surety, but will hold that, in such a case, *the surety himself must be the sole judge whether or not he will consent to remain liable* notwithstanding the alteration, and that if he has not so consented he will be discharged" (*q*).

But an alteration in the position of a surety brought about by the act of an employer does not discharge the surety, if the act of the employer has been caused by the fraud of a contractor whose honesty the surety has guaranteed (*r*).

Altering the terms is not the only way in which the surety becomes a free man once more. He is always discharged in the following cases:—

Misrepresentation or concealment.

(1.) *If there has been a fraudulent misrepresentation to, or concealment from, him* (*s*).

But the creditor is not bound to communicate every circumstance calculated to influence the discretion of the surety in entering into the contract; what he must disclose is simply any arrangement between himself and the debtor which would make the surety's position different from what he would reasonably expect (*t*). "The plaintiff and defendant," said Holroyd, J., in the case last referred to, "*were not on equal terms*. The former with the knowledge of a fact which necessarily must have the effect of increasing the responsibility of the surety, without communicating that fact to him, suffers him to give the guarantee. That was a fraud upon the defendant, and vitiates the contract." Moreover, as was said by

(*q*) Holme *v.* Brunskill (1877), 3 Q. B. D. 495; 47 L. J. Q. B. 610. See also Taylor *v.* Bank of New South Wales (1886), 11 App. Cas. 596; 55 L. J. P. C. 47.

(*r*) See Kingston-upon-Hull Corporation *v.* Harding, [1892] 2 Q. B. 494; 62 L. J. Q. B. 55.

(*s*) Lee *v.* Jones (1864), 17 C. B. N. S. 482; 34 L. J. C. P. 131; Phillips *v.* Foxall (1872), L. R. 7 Q. B. 666; 41 L. J. Q. B. 293.

(*t*) Hamilton *v.* Watson (1845), 12 Cl. & Fin. 109; Pidcock *v.* Bishop (1825), 3 B. & C. 605; 5 D. & R. 505; and see Byrne *v.* Muzio (1882), 8 L. R. Ir. 396.

the Lord Chancellor, in Owen *v.* Homan (*u*) (where the surety was an infirm old married woman, living apart from her husband, and the aunt of the debtor), "without saying that in every case a creditor is bound to inquire under what circumstances his debtor has obtained the concurrence of a surety, it may safely be stated that if the dealings are such as fairly to lead a reasonable man to believe that fraud must have been used in order to obtain such concurrence, *he is bound to make inquiry*, and cannot shelter himself under the plea that he was not called on to ask, and did not ask, any questions on the subject."

Giving time.

(2.) *If the creditor enters into a binding agreement with the debtor to give him time, unless by such agreement the creditor reserves his rights against the surety* (*x*).

The reason why the surety is discharged in this case is that the creditor by giving time to the debtor has, for the time at least, put it out of the power of the surety to consider whether he will have recourse to his remedy against the principal debtor or not, and because the surety cannot in fact have the same remedy against the principal as he would have had under the original contract (*y*).

Mere *forbearance or laches*, however, will not discharge the surety (*z*). Nor will a contract *with a stranger* to give time to the principal debtor affect the right against the surety (*a*).

"Where two or more sureties contract severally, the creditor does not break the contract with one of them by releasing the other. The contract remaining entire, the surety in order to escape liability must show an existing right to contribution from his co-surety which has been taken away or injuriously affected by his release" (*b*).

Debt satisfied.

(3.) *If the principal debt is released or satisfied.*

(*u*) (1853), 4 H. L. C. 997; 20 L. J. Ch. 314.

(*x*) Rees *v.* Berrington (1795), 2 Ves. jun. 540; 3 R. R. 3; Croydon Gas Co. *v.* Dickinson (1876), 2 C. P. D. 46; 46 L. J. C. P. 157; but see York Banking Co. *v.* Bainbridge (1880), 43 L. T. 732; Yates *v.* Evans (1892), 61 L. J. Q. B. 446; 66 L. T. 532; approved in Kirkwood *v.* Carroll, [1903] 1 K. B. 531; 72 L. J. K. B. 208.

(*y*) See per Blackburn, J., in Polak *v.* Everett (1876), 1 Q. B. D. 669; 45 L. J. Q. B. 369.

(*z*) Orme *v.* Young (1815), 1 Holt, 84; 4 Camp. 336; Goring *v.* Edmunds (1829), 6 Bing. 94; 3 M. & P. 259; Oriental Financial Corporation *v.* Overend & Co. (1871), L. R. 7 Ch. 142; 41 L. J. Ch. 332; Rouse *v.* Bradford Banking Co., [1894] A. C. 586; 63 L. J. Ch. 890.

(*a*) Lyon *v.* Holt (1839), 5 M. & W. 250; 2 H. & H. 41; Fraser *v.* Jordan (1858), 8 E. & B. 303; 26 L. J. Q. B. 288; Clarke *v.* Birley (1889), 41 Ch. D. 422; 60 L. T. 948.

(*b*) Ward *v.* National Bank of New Zealand (1883), 8 App. Cas. 755; 52 L. J. P. C. 65; and see *In re* E. W. A., [1901] 2 K. B. 642; 70 L. J. K. B. 810.

"It may be taken as settled law," said Lord Morris in a recent case (*c*) in the Privy Council, "that where there is an absolute release of the principal debtor, the remedy against the surety is gone because the debt is extinguished, and where such actual release is given no right can be reserved because the debt is satisfied, and no right of recourse remains when the debt is gone. Language importing an absolute release may be construed as a covenant by the creditor not to sue the principal debtor, when that intention appears, leaving such debtor open to any claims of relief at the instance of his sureties. But a covenant not to sue the principal debtor is a partial discharge only, and, although expressly stipulated, is ineffectual, if the discharge given is in reality absolute."

But it may be mentioned here that when several persons join together in a bond of suretyship, *e.g.*, in the sum of £50 each for the honesty of a clerk, they are *separately liable*, so that the payment of £50 by one of them is no answer to an action on the bond against one of the others (*d*).

Consideration not performed.

(4.) *If the creditor omits to do something which was the surety's consideration for entering on the responsibility* (*e*).

Surety's interest prejudiced.

(5.) *If the person guaranteed does something distinctly injurious to the interest of the surety;*

e.g., if I am surety for the honest services of a clerk, and his master systematically throws temptations in his way (*f*). But the master's *mere passive inactivity* will not discharge the surety. If, however, he finds out that the servant has been guilty of dishonesty, he must inform the surety, who may withdraw (*g*).

Continuing guaranties.

It often becomes an important and difficult question whether a particular guaranty is a *continuing* one or not; that is to say, *whether the surety's undertaking is to be confined or not to one transaction.* The question is to be answered by considering the surrounding circumstances, and getting as near as possible to the intention of the parties, the presumption being that it *is* a continuing guaranty, because "if a party meant to confine his liability to a single dealing, he should take care to say so" (*h*). A man who had a nephew setting up as a butcher gave a cattle dealer this undertaking:—

Heffield *v.* Meadows.

"*I, John Meadows, of Barwick, in the county of Northampton, will*

(*c*) Commercial Bank of Tasmania *v.* Jones, [1893] A. C. 313; 62 L. J. P. C. 104.

(*d*) Armstrong *v.* Cahill (1880), 6 L. R. Ir. 440.

(*e*) See Fitzgerald *v.* M'Cowan (1898), 2 Ir. R. 1.

(*f*) Smith *v.* Bank of Scotland (1813), 1 Dow. 272; 14 R. R. 67.

(*g*) Burgess *v.* Eve (1872), L. R. 13 Eq. 450; 41 L. J. Ch. 515; and see Guardians of Mansfield Union *v.* Wright (1882), 9 Q. B. D. 683; 46 J. P. 200; *In re* Wolmershausen (1890), 62 L. T. 541; 38 W. R. 537.

(*h*) Per Lord Ellenborough in Merle *v.* Wells (1810), 2 Camp. 413.

be answerable for £50 sterling that William York, of Stamford, butcher, may buy of Mr. John Heffield, of Donington."

The young butcher made payments at various times to Mr. Heffield, amounting to over £90, but he afterwards failed to meet his engagements; and the question was whether anything could be got out of Meadows as surety. Meadows strenuously maintained that, as his nephew had paid £90, and £90 was a larger sum of money than £50—the amount for which he had undertaken to be liable—the guaranty was at an end. But it was held that, as the object of the guaranty plainly was *to keep the young man going as a butcher*, it was a continuing guaranty, and Meadows must pay (*i*). The cases, however, run pretty close, as may be imagined when it is said that the following was held *not* to be a continuing guaranty:— Nicholson *v.* Paget.

"*I hereby agree to be answerable for the payment of £50 for T. Lerigo, in case T. Lerigo does not pay for the gin he receives from you*" (*k*).

As to when the Statute of Limitations begins to run in the case of a continuing guaranty, reference should be made to the recent case of Parr's Banking Co. *v.* Yates (*l*).

A guaranty given *to, or for, a firm* only continues binding after a change in its constitution when it appears to have been the clear intention that it should so continue (*m*). Guaranties to or for firm.

The death of the surety does not *per se* operate as a revocation of a continuing guaranty, but notice to the creditor determines it as to future advances (*n*). But a guaranty the consideration of which is given once for all (*e.g.*, admission as an underwriting member at Lloyd's) cannot be determined by the guarantor, and does not cease at his death (*o*). Death of surety.

(*i*) Heffield *v.* Meadows (1869), L. R. 4 C. P. 595; 20 L. T. 746.

(*k*) Nicholson *v.* Paget (1832), 1 C. & M. 48; 5 C. & P. 395.

(*l*) [1898] 2 Q. B. 460; 67 L. J. Q. B. 851.

(*m*) The Partnership Act, 1890 (53 & 54 Vict. c. 39), s. 18. "A continuing guaranty or cautionary obligation given either to a firm or to a third person in respect of the transactions of a firm is, in the absence of agreement to the contrary, revoked as to future transactions by any change in the constitution of the firm to which, or of the firm in the transactions of which, the guaranty or obligation was given"; and see Backhouse *v.* Hall (1865), 6 B. & S. 507; 34 L. J. Q. B. 141.

(*n*) Coulthart *v.* Clementson (1879), 5 Q. B. D. 42; 49 L. J. Q. B. 204; and see *In re* Silvester, Midl. Ry. Co. *v.* Silvester, [1895] 1 Ch. 573; 64 L. J. Ch. 390; Harriss *v.* Fawcett (1873), L. R. 8 Ch. 866; 42 L. J. Ch. 502; Beckett *v.* Addyman (1882), 51 L. J. Q. B. 597; 9 Q. B. D. 783; and Dodd *v.* Whelan (1897), 1 Ir. R. 575.

(*o*) Lloyd's *v.* Harper (1880), 16 Ch. Div. 290; 50 L. J. Ch. 140; and see *In re* Crace, Balfour *v.* Crace, [1902] 1 Ch. 733; 71 L. J. Ch. 358.

Transfer of securities to surety.

A surety who has paid his friend's debt is entitled to have transferred to him any securities which the creditor may have held, notwithstanding his ignorance of their existence, or their having been given since he entered on the suretyship (*p*). This right arises at the time of his becoming surety, and does not arise merely if, and when, he discharges the obligation of the principal debtor (*q*). And if the creditor has so dealt with the security that on payment by the surety it is no use to him, he is discharged to the extent of the security (*r*). On the other hand, however, a creditor is not entitled to the exclusive benefit of a security given by his debtor to the surety (*s*).

Where one of several co-sureties has paid off the debt, he is entitled to the benefit of a proof by the creditor against one of the co-sureties for the full amount of the debt, and his right of proof is not (though his right of receiving dividends is) limited to the sum which, as between him and his co-surety, such co-surety is liable to pay (*t*).

Contribution.

A surety is also entitled to call on his co-sureties (whether bound by the same instrument or not (*u*)) for *contribution;* and if there are three co-sureties, of whom one has become insolvent, the surety who has been compelled to pay the debt may come upon the remaining solvent surety not merely for an aliquot proportion of the money paid, but for a moiety (*x*). And on this subject reference should be made to the important judgment of Lord Russell, C. J., in the recent case of Ellesmere Brewery Co. *v.* Cooper (*y*), where it was held that when two or more persons join as sureties for a common principal, but bind themselves in different amounts, in the event of the principal being in default they are liable to contribute to the satisfaction of the creditor's claim *in proportion to the limits of their respective liabilities, and not in equal amounts.* Besides

(*p*) 19 & 20 Vict. c. 97, s. 5. See *In re* McMyn (1886), 33 Ch. D. 575; 55 L. J. Ch. 845.

(*q*) Dixon *v.* Steel, [1901] 2 Ch. 602; 70 L. J. Ch. 794; discussing *dicta* of Page-Wood, V.-C., in South *v.* Bloxam (1865), 34 L. J. Ch. 369; 2 H. & M. 457.

(*r*) Campbell *v.* Rothwell (1877), 47 L. J. Q. B. 144; 38 L. T. 33; and see Rainbow *v.* Juggins (1880), 5 Q. B. D. 422; 49 L. J. Q. B. 718.

(*s*) *In re* Walker, Sheffield Banking Co. *v.* Clayton, [1892] 1 Ch. 621; 61 L. J. Ch. 234.

(*t*) *In re* Parker, Morgan *v.* Hill, [1894] 3 Ch. 400; 64 L. J. Ch. 6. But whether the result would be the same if the creditor had never proved, and the surety, who had paid the debt, had, in the first instance, claimed against his co-surety, *quære*, see per Davey, L. J.

(*u*) Dering *v.* Winchelsea (1787), 1 Cox, 318; 1 R. R. 41; and see Ramskill *v.* Edwards (1885), 31 Ch. Div. 100; 55 L. J. Ch. 81.

(*x*) 36 & 37 Vict. c. 66, s. 25, sub-s. (11).

(*y*) [1896] 1 Q. B. 75; 65 L. J. Q. B. 173.

being entitled to contributions from each other, sureties are also entitled to the benefit of all securities which any one of them may have taken (*z*). And when one of several co-sureties has had judgment against him for the whole of the principal debt, though he cannot obtain contribution against the others until he has actually paid more than his own share (*a*), he is entitled to a declaration of his right to contribution, and to a prospective order that on paying his own share he be indemnified by his co-sureties against further liability (*b*).

It should be observed that an agreement by a surety to give time to the principal debtor does not discharge a co-surety from his liability for contribution (*c*).

See also Lawes *v.* Maughan (1884), 1 C. & E. 340; Carter *v.* White (1883), 25 Ch. D. 666; 54 L. J. Ch. 138; Ashby *v.* Day (1885), 54 L. J. Ch. 935; 54 L. T. 408; Oddy *v.* Hallett (1885), 1 C. & E. 532; and The Mayor of Durham *v.* Fowler (1889), 22 Q. B. D. 394; 58 L. J. Q. B. 246; Bolton *v.* Salmon, [1891] 2 Ch. 48; 60 L. J. Ch. 239; Barber *v.* Mackrell (1893), 68 L. T. 29; 41 W. R. 341.

Material Alteration Vitiates Written Instrument.

MASTER *v.* MILLER. (1791) [94]

[2 H. Bl. 141; 5 T. R. 637.]

On March 26th, 1788, Peel and Co., of Manchester, drew a bill for £1,000 on Miller, payable three months after date to Wilkinson and Cooke. This bill they delivered to Wilkinson and Cooke, and Miller afterwards accepted it. Wilkinson and Cooke then indorsed it for

(*z*) Steel *v.* Dixon (1881), 17 Ch. D. 825; 50 L. J. Ch. 591; Berridge *v.* Berridge (1890), 44 Ch. D. 168; 59 L. J. Ch. 533.

(*a*) *In re* Snowden (1881), 17 Ch. D. 44; 50 L. J. Ch. 540; and see Davies *v.* Humphreys (1840), 6 M. & W. 153; 4 Jur. 250; *In re* Macdonald (1888), W. N. 130.

(*b*) Wolmershausen *v.* Gullick, [1893] 2 Ch. 514; 62 L. J. Ch. 773.

(*c*) See Greenwood *v.* Francis, [1899] 1 Q. B. 312; 68 L. J. Q. B. 228.

value to the plaintiff. But before doing so they made one or two little alterations with the object of improving the document. March 26th they changed into March 20th; and they inserted June 23rd at the top to indicate that the bill would become due on that day. These alterations, *being to accelerate payment and unauthorized*, were held to vitiate the instrument.

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[95] ALDOUS *v.* CORNWELL. (1868)

[L. R. 3 Q. B. 573; 37 L. J. Q. B. 201.]

In November, 1865, Cornwell gave his promissory note to this effect—"I promise to pay Mr. Edward Aldous the sum of £125." By-and-by Aldous asked Cornwell to pay the £125. Cornwell was about to do so when he noticed that two words had been added to the note he had made, so that it now ran, "*On demand* I promise to pay, &c." Cornwell on this refused to pay, pleading that he "did not make the note as alleged." The result of an action, however, was that he was compelled to pay *as the alteration was an immaterial one*, all notes which express no time for payment being payable "on demand."

Effect of alteration.

The law looks with great disfavour on the alteration of written instruments. Even when the alteration is made with the consent of both parties (unless it be merely to correct a mistake and render the document what it has all along been intended to be), there must be *a new stamp* just as if it were a new contract (*d*).

Pigot's case.

One of the earliest, and for a long time the most important, cases on alteration without consent is Pigot's case (*e*). That case referred only to deeds; but its principle was afterwards extended to bills of exchange, guarantees, bought and sold notes, charter-parties,

(*d*) Reed *v.* Deere (1827), 7 B. & C. 261; 2 C. & P. 624; Bowman *v.* Nichol (1794), 5 T. R. 537; 1 Esp. 81.

(*e*) (1615), 11 Co. 26.

and other instruments. But the part of the second resolution of Pigot's case, which says that "*if the obligee himself alters the deed, although it is in words not material, yet the deed is void,*" is not now law.

Material alteration vitiates. Suffell *v.* Bank of England.

A material alteration, no matter by whom, vitiates a written instrument. Thus, in Suffell *v.* Bank of England (*f*), it was held that the alteration of a Bank of England note by erasing the number upon it and substituting another was a material alteration which avoided the instrument, so that a *bonâ fide* holder for value could not afterwards maintain an action on it. In Warrington *v.* Early (*g*), it appeared that three persons had made their joint and several promissory note "*with lawful interest.*" The holder persuaded two of them, in the absence of the third, to add in the corner, by way of explanation, "*interest at 6 per cent.*" It was held that he could not recover against the third party, as the note had been materially altered. In Vance *v.* Lowther (*h*), a dishonest clerk had absconded with a cheque drawn in his master's favour. After altering the date from March 2nd to March 26th, he passed it to the plaintiff for value. It was held that the alteration was material and invalidated the cheque, so that the plaintiff, in spite of having acted prudently and uprightly, could not successfully sue the drawer. In this case it was also held that *materiality is a question of law*, and that, in deciding it, reference is to be had to the contract alone, and not to the surrounding circumstances. But *alterations by accident* (*e.g.*, by a mischievous little boy tearing off a seal, or by rats eating it) *or mistake* do not affect the liability (*i*).

Warrington *v.* Early.

Vance *v.* Lowther.

Mistake or accident.

Collateral purpose.

The instrument may be given in evidence *for a collateral purpose*, notwithstanding a material alteration. A landlord once brought an action against a tenant for not cultivating according to the terms of the written agreement between them. The written agreement, when produced, was found to be stained with an erasure in the habendum, the term of years having been altered from seven to fourteen. As a matter of fact, the defendant was a yearly tenant under a parol

(*f*) (1882), 9 Q. B. D. 555; 51 L. J. Q. B. 401; and see Leeds and County Bank *v.* Walker (1883), 11 Q. B. D. 84; 52 L. J. Q. B. 590; Lowe *v.* Fox (1887), 12 App. Cas. 206; 56 L. J. Q. B. 480; and Ellesmere Brewery Co. *v.* Cooper, [1896] 1 Q. B. 75; 65 L. J. Q. B. 173.

(*g*) (1853), 2 E. & B. 763; 23 L. J. Ex. 47.

(*h*) (1876), 1 Ex. Div. 176; 45 L. J. Ex. 200; and see Harris *v.* Tenpany (1883), 1 C. & E. 65; Pattinson *v.* Luckley (1875), L. R. 10 Ex. 330; 44 L. J. Ex. 180.

(*i*) Raper *v.* Birkbeck (1812), 15 East, 17; 13 R. R. 354; Argoll *v.* Cheney (1624), Palm. 402; but see Davidson *v.* Cooper (1844), 13 M. & W. 343; 12 L. J. Ex. 467.

agreement which incorporated only so much of the written instrument as was applicable to a yearly holding, so that it did not matter whether the written agreement said 14 or 140 years. For this reason the instrument was admitted in evidence to prove the terms on which the tenant held the land (*k*).

Act of 1882.

With regard to the alteration of bills of exchange, the law has been codified. The 63rd and 64th sections of the Bills of Exchange Act, 1882 (*l*), are as follows:—

Cancellation.

"63.—(1.) Where a bill is intentionally cancelled by the holder or his agent, and the cancellation is apparent thereon, the bill is discharged.

"(2.) In like manner any party liable on a bill may be discharged by the intentional cancellation of his signature by the holder or his agent. In such a case any indorser, who would have had a right of recourse against the party whose signature is cancelled, is also discharged.

"(3.) A cancellation made unintentionally, or under a mistake, or without the authority of the holder, is inoperative; but where a bill or any signature thereon appears to have been cancelled, the burden of proof lies on the party who alleges that the cancellation was made unintentionally, or under a mistake, or without authority.

Alteration of bill.

"64.—(1.) Where a bill or acceptance is materially altered without the assent of all parties liable on the bill, the bill is avoided except as against a party who has himself made, authorized, or assented to the alteration, and subsequent indorsers.

"Provided that, where a bill has been materially altered, but the alteration is not apparent, and the bill is in the hands of a holder in due course, such holder may avail himself of the bill as if it had not been altered, and may enforce payment of it according to its original tenour (*m*).

What alterations are material.

"(2.) In particular, the following alterations are material, namely, any alteration of the date, the sum payable, the time of payment, the place of payment, and, where a bill has been accepted generally, the addition of a place of payment without the acceptor's assent."

Material.

The following alterations have been held to be material:—

Where a particular consideration is substituted for the words "value received" (*n*); or the date of a bill payable at a fixed period

(*k*) Falmouth *v.* Roberts (1842), 9 M. & W. 469; 11 L. J. Ex. 180.

(*l*) 45 & 46 Vict. c. 61.

(*m*) But see Scholfield *v.* Londesborough, [1896] A. C. 514; 65 L. J. Q. B. 593.

(*n*) Knill *v.* Williams (1809), 10 East, 431; 10 R. R. 349; cf. Wright *v.* Inshore (1842), 1 D. N. S. 802; 6 Jur. 857.

after date is altered, and the time of payment thereby postponed (*o*) or accelerated (*p*); or a bill payable three months after date is converted into a bill payable three months after sight (*q*); or the date of a cheque or bill payable on demand is altered (*r*); or the crossing of a cheque is altered (*s*); or the sum payable is altered, *e.g.*, from £105 to £100 (*t*); or the specified rate of interest is altered, *e.g.*, from 3 per cent. to 2½ per cent. (*u*); or a bill payable "with lawful interest" is altered by adding the words "interest at six per cent." (*x*); or a particular rate of exchange is indorsed on a bill which does not authorize this to be done (*y*); or a joint note is converted into a joint and several note (*z*); or a new maker is added to a joint and several note (*a*); or the name of a maker of a joint and several note is cut off (*b*), or intentionally erased (*c*); or the place of payment is altered, *e.g.*, a bill is accepted payable at X. & Co.'s and Y. & Co. is substituted for X. & Co. (*d*); or a place for payment is added *without* the acceptor's consent (*e*); or the number on a Bank of England note is altered (*f*).

Immaterial.

The following alterations have been held to be immaterial:—

A bill payable to C. or bearer is converted into a bill payable to C. or order (*g*); or an indorsement in blank is converted into a special indorsement (*h*); or the words "on demand" are added to a note in which no time of payment is expressed (*i*); or a bill addressed to Brown & Co., under the style of Brown, Smith & Co.,

(*o*) Outhwaite *v.* Luntley (1815), 4 Camp. 179; 16 R. R. 771; Hirschman *v.* Budd (1873), L. R. 8 Ex. 171; 42 L. J. Ex. 113; Société Générale *v.* Metropolitan Bank (1873), 27 L. T. 849; 21 W. R. 335.

(*p*) Master *v.* Miller, *supra*; Walton *v.* Hastings (1815), 4 Camp. 223; 1 Stark. 215.

(*q*) Long *v.* Moore (1790), 3 Esp. 155, n.

(*r*) Vance *v.* Lowther, *supra*.

(*s*) See sect. 78 of the Bills of Exchange Act, 1882, overriding Simmonds *v.* Taylor (1858), 27 L. J. C. P. 248.

(*t*) Cf. Hamelin *v.* Bruck (1846), 9 Q. B. 306; 15 L. J. Q. B. 343.

(*u*) Sutton *v.* Toomer (1827), 7 B. & C. 416; 1 M. & Ry. 125.

(*x*) Warrington *v.* Early, *supra*.

(*y*) Hirschfield *v.* Smith (1866), L. R. 1 C. P. 340; 35 L. J. C. P. 177.

(*z*) Perring *v.* Hone (1826), 4 Bing. 28; 2 Car. & P. 401.

(*a*) Gardner *v.* Walsh (1855), 5 E. & B. 83; 24 L. J. Q. B. 285; cf. Clerk *v.* Blackstock (1816), Holt. N. P. 474; 17 R. R. 667.

(*b*) Cf. Mason *v.* Bradley (1843), 11 M. & W. 590; 12 L. J. Ex. 425.

(*c*) Nicholson *v.* Revill (1836), 4 A. & E. 675; 6 N. & M. 192.

(*d*) Tidmarsh *v.* Grover (1813), 1 M. & S. 735; 14 R. R. 563.

(*e*) Calvert *v.* Baker (1838), 4 M. & W. 417; 8 L. J. Ex. 40; Burchfield *v.* Moore (1854), 23 L. J. Q. B. 261; 3 E. & B. 683; cf. Hanbury *v.* Lovett (1868), 18 L. T. 366; 16 W. R. 795.

(*f*) Suffell *v.* Bank of England, *supra*; Leeds Bank *v.* Walker, *supra*.

(*g*) Attwood *v.* Griffin (1826), 2 C. & P. 368; R. & M. 425.

(*h*) See sect. 34 (4) of the Bills of Exchange Act, 1882.

(*i*) Aldous *v.* Cornwell, *supra*; and see sect. 10 of Bills of Exchange Act, 1882.

is accepted by them as Brown & Co., and the address is afterwards altered to make it correspond with the acceptance (*k*); or an erroneous due date is added to a bill (*l*); or the words "or order" are struck out by the acceptor in the case of a bill payable to "D. or order" (*m*).

Onus of proof.

It lies upon the party suing upon an altered contract to account for any material alteration that appears upon the face of it, or to give some reasonable evidence from which it may be inferred that the alteration was not made under such circumstances as would avoid the instrument.

Acknowledgments Saving the Statute of Limitations.

[96] TANNER *v.* SMART. (1827)

[6 B. & C. 603; 9 D. & R. 549.]

In 1816 Smart gave Tanner his promissory note for £160. In 1819 Tanner showed it him, and delicately suggested a settlement. Smart said frankly, "*I can't pay the debt at present, but I will pay it as soon as I can.*" Five years slipped by, and Tanner brought an action on the note, to which Smart pleaded *actio non accredit infra sex annos*—in other words, pleaded the Statute of Limitations. In reply to that defence, Tanner proved that only five years had elapsed since Smart had spoken the aforesaid words. This, however, was considered to be insufficient, in the absence of proof of the defendant's ability to pay.

21 Jac. 1, c. 16.

Effect of part payment or

If I allow six years to pass without making my simple contract debtor pay me what he owes, my *remedy* against him is barred by

(*k*) Farquhar *v.* Southey (1826), M. & M. 14; 2 C. & P. 497.

(*l*) Fanshawe *v.* Peet (1857), 26 L. J. Ex. 314; 2 H. & N. 1.

(*m*) Decroix *v.* Meyer (1890), 25 Q. B. D. 343; 59 L. J. Q. B. 538; and see Chalmers' "Bills of Exchange," p. 215 (5th ed.).

the Statute of Limitations. But let me consider whether he has not perchance done something in his guilelessness to interrupt the operation of that statute. There are two ways in which the debt may have been revived. Acknowledgment.

(1.) By *part payment*, or payment of interest (*n*); and

(2.) By *acknowledgment written and signed* (*o*).

But the part payment or acknowledgment must be of such a nature as not to be inconsistent with an *implied promise to pay* the whole debt claimed (*p*). A *refusal to pay* (for instance, where the debtor said, "*I know that I owe the money; but the bill I gave is on a threepenny receipt stamp, and I will never pay it,*") is not good enough (*q*); and when there is a *conditional promise*, the creditor must prove the performance of the condition (*r*). Promise to pay must be capable of being implied.

In Green *v.* Humphreys (*s*), the letter relied on as taking the debt out of the statute contained the following passage:—"I thank you for your very kind intention to give up the rent of Tyn-y-Burwydd next Christmas, but I am happy to say at that time both principal and interest will have been paid in full." It was held that this would not do for the purpose. "It seems to me," said Bowen, L. J., "that, although there is here an acknowledgment of a debt in a sense, there is not a clear acknowledgment of a debt in such a way as to raise the implication of a promise to pay, but, on the contrary, only in such a way as to exclude the idea of a promise to pay, and to imply that the writer did not undertake to pay." "I think," said Fry, L. J., "that the words of the letter which have been referred to may be fairly paraphrased in this way, 'I thank you for your very kind intention to let my wife receive the rents of her estate after next Christmas, but your kindness is apparent and not real, for by next Christmas the debt to satisfy which you have been stopping her rents will have been fully satisfied in some manner or another.' That appears to me to be the best paraphrase which I can give to the sentence in question Green *v.* Humphreys.

(*n*) See Morgan *v.* Rowlands (1872), L. R. 7 Q. B. 493; 41 L. J. Q. B. 187; Burn *v.* Boulton (1846), 2 C. B. 476; 15 L. J. C. P. 97; Maber *v.* Maber (1867), L. R. 2 Ex. 153.

(*o*) 9 Geo. 4, c. 14, s. 1; and 19 & 20 Vict. c. 97, s. 13.

(*p*) Smith *v.* Thorne (1852), 18 Q. B. 134; 21 L. J. Q. B. 199; Skeet *v.* Lindsay (1877), 2 Ex. D. 314; 46 L. J. Ex. 249; Quincey *v.* Sharp (1876), 1 Ex. D. 72; 45 L. J. Ex. 347.

(*q*) A'Court *v.* Cross (1825), 3 Bing. 328; 11 Moore, 198; and see Humphreys *v.* Jones (1845), 14 M. & W. 1; 14 L. J. Ex. 254.

(*r*) Meyerhoff *v.* Froehlich (1878), 4 C. P. D. 63; 48 L. J. C. P. 43; Nichols *v.* Regent's Canal Co. (1894), 63 L. J. Q. B. 641; 71 L. T. 249, 836.

(*s*) (1884), 26 Ch. D. 474; 53 L. J. Ch. 625; and see Langrish *v.* Watts, [1903] 1 K. B. 636; 72 L. J. K. B. 435.

when I regard the surrounding circumstances of the case, and in that I find no acknowledgment that a debt is due from the writer."

In re Buskin.

But where a debtor wrote, in reply to a demand by his creditor for payment, "I don't see how it is possible for me to be indifferent in the matter of this debt. If I were able in any way to reduce it further, you may be quite sure that I should do so," it was held to be a sufficient acknowledgment to take the debt out of the statute (*t*).

And it has recently been held that parol evidence is admissible to show that a letter was written in answer to a former one, in order to read the two letters together that they may constitute an acknowledgment to take a debt out of the statute (*u*).

Non-dissent not equivalent to acknowledgment.

The mere sending of an account to a debtor appropriating money of the debtor, over which the creditor has control, to his debt, and from which appropriation the debtor does not dissent, does not amount to an "acknowledgment" by the debtor within the meaning of the statute (*x*).

An acknowledgment of, or promise to pay, a debt of a testator, by one of several executors, is sufficient to take the case out of the statute (*y*).

An "acknowledgment" or promise to pay, if contained in a letter written "*without prejudice*," does not avail to take the case out of the statute (*z*).

Payment must be before action brought.

An acknowledgment *since action brought* is not sufficient (*a*); nor is an acknowledgment *to a stranger*, for it must be to the creditor or his agent, to some one who is entitled to receive payment of the debt (*b*). Thus, in an action by the indorsees against the maker of a promissory note, after the indorsement and within six years of the commencement of the action, the defendant had made a payment on account of the note *to the payee*, who had no authority to

(*t*) *In re* Buskin, *Ex parte* Farlow (1895), 15 R. 117.

(*u*) McGuffie *v.* Burleigh (1898), 78 L. T. 264.

(*x*) *In re* McHenry, [1894] 3 Ch. 290; 71 L. T. 146; and see Smith *v.* Betty, [1903] 2 K. B. 317.

(*y*) *In re* Macdonald, Dick *v.* Fraser, [1897] 2 Ch. 181; 66 L. J. Ch. 630; distinguishing Tullock *v.* Dunn (1826), Ry. & Mo. 416; 27 R. R. 765; and Scholey *v.* Walton (1844), 13 L. J. Ex. 122; 12 M. & W. 510.

(*z*) *In re* River Steamboat Co. (1871), L. R. 6 Ch. 822; 25 L. T. 319.

(*a*) Bateman *v.* Pinder (1842), 3 Q. B. 574; 2 G. & D. 790; overruling Yea *v.* Fouraker (1760), 2 Bun. 1099; Thornton *v.* Illingworth (1824), 2 B. & C. 824; 4 D. & R. 525.

(*b*) See Grenfell *v.* Girdlestone (1837), 2 Y. & C. 622; 7 L. J. Ex. 42; Howcutt *v.* Bonser (1849), 3 Ex. 491; 18 L. J. Ex. 262; Haydon *v.* Williams (1830), 7 Bing. 163; 4 M. & P. 811; Godwin *v.* Culley (1859), 4 H. & N. 373; Stamford Banking Co. *v.* Smith, [1892] 1 Q. B. 765; 61 L. J. Q. B. 405.

receive the money on behalf of the plaintiffs; it was held that such payment was not sufficient to take the case out of the statute (*c*).

It is immaterial, however, whether the payment on account of the debt was made before or after the debt had already become statute-barred; for the statute does not extinguish the debt, but only takes away the remedy by action (*d*). But may be after debt has become statute-barred.

The payment relied on need not necessarily have been made in cash; thus if goods be given and accepted in part payment within six years, that saves the statute (*e*). And need not be in cash.

The statute commences to run from *the time when the cause of action first accrues* (*f*). Thus, when goods are sold on credit, the six years are counted, not from the date of the sale, but from the time when the credit expires (*g*). In the case, however, of a promissory note payable on demand, the statute begins to run at once (*h*). Where a sum of money is payable by instalments, and there is an agreement between the debtor and the creditor that, on non-payment of any one of such instalments, the whole shall become due, the statute begins to run from the first default (*i*). When statute begins to run. Sale on credit. Promissory note payable on demand.

Dividends declared by a company are, when payable, debts due from the company to the shareholders, which the shareholders can recover in an action against the company; and the claims of the shareholders in respect thereof are liable to become barred under the statute (*k*). Dividends.

The shareholder's cause of action under the Directors' Liability

(*c*) Stamford *v.* Banking Co. Smith, *supra*.

(*d*) See Heylin *v.* Hastings, 1 Ld. Raym. 389, 421, cited in Tanner *v.* Smart, *supra*; and London and Midland Bank *v.* Mitchell, [1899] 2 Ch. 161; 68 L. J. Ch. 568. See also *In re* Clifden, [1900] 1 Ch. 774; 69 L. J. Ch. 478.

(*e*) Hooper *v.* Stephens (1835), 4 A. & E. 71; 5 L. J. K. B. 4; Hart *v.* Nash (1836), 2 C. M. & R. 337; 1 Gale, 171; Collinson *v.* Margesson (1858), 27 L. J. Ex. 305; but see Cottam *v.* Patridge (1841), 4 M. & Gr. 271; 11 L. J. C. P. 161; and Clark *v.* Alexander (1843), 8 Scott, N. R. 147; 13 L. J. C. P. 133.

(*f*) Hemp *v.* Garland (1843), 4 Q. B. 519; 12 L. J. Q. B. 134; Wilkinson *v.* Verity (1871), L. R. 6 C. P. 206; 40 L. J. C. P. 141; Miller *v.* Dell, [1891] 1 Q. B. 468; 60 L. J. Q. B. 404; and Parr's Banking Co. *v.* Yates, [1898] 2 Q. B. 460; 67 L. J. Q. B. 851; where a surety was held liable on a continuing guarantee for interest accrued within six years on advances made more than six years before action brought.

(*g*) Helps *v.* Winterbottom (1831), 2 B. & Ad. 431; 9 L. J. K. B. 258.

(*h*) Norton *v.* Ellam (1837), 2 M. & W. 461; 1 Jur. 433; and see *In re* Rutherford, Brown *v.* Rutherford (1880), 14 Ch. D. 687; 49 L. J. Ch. 654.

(*i*) Hemp *v.* Garland, *supra*, followed in Reeves *v.* Butcher, [1891] 2 Q. B. 509; 60 L. J. Q. B. 619.

(*k*) *In re* Severn and Wye Ry. Co., [1896] 1 Ch. 559; 65 L. J. Ch. 400.

Act, 1890 (53 & 54 Vict. c. 64), arises when the shares are subscribed for (*l*).

Solicitors' costs.

The cause of action in respect of work done by a solicitor arises upon the completion of the work, and not at the expiration of one month from the delivery of a bill of costs, and therefore the statute runs from the completion of the work (*m*).

On default made by a debtor in the payment of a composition under a composition deed, the Court implies a fresh promise on his part to pay the original debts, and the Statute of Limitations does not begin to run until such default (*n*).

The statute does not commence to run in favour of a person whilst he is beyond seas, notwithstanding that the action is one in which leave to serve the writ out of the jurisdiction could have been obtained under Ord. XI. of the R. S. C. 1883 (*o*).

Principal, surety, and co-sureties.

In cases between principal and surety, the statute begins to run against the latter from the time of his first payment in ease of the principal. But, as between one co-surety and another, the statute does not begin to run against the surety until he has paid more than his proportion of the debt for which he and his co-surety are jointly liable (*p*). And a similar rule applies as between one co-trustee and another (*q*).

Indemnity.

In the case of a contract of *indemnity*, the statute does not begin to run until the lapse of six years from the actual damnification (*r*). And, accordingly, where the defendant had obtained from the plaintiff the loan of his acceptance for £40 payable forty days after date, it was held that the statute began to run from the time the bill was paid by the plaintiff, and not from the time it became due (*s*).

(*l*) Thomson *v.* Clanmorris, [1900] 1 Ch. 718; 69 L. J. Ch. 337.

(*m*) Coburn *v.* Colledge, [1897] 1 Q. B. 702; 66 L. J. Q. B. 462.

(*n*) *In re* Stock, *Ex parte* Ames (1897), 66 L. J. Q. B. 146; 75 L. T. 422; following Irving *v.* Veitch (1837), 7 L. J. Ex. 25; 3 M. & W. 90.

(*o*) Musurus Bey *v.* Gadban, [1894] 2 Q. B. 352; 63 L. J. Q. B. 621; where it was held that the statute does not commence to run in favour of the ambassador of a foreign state whilst he is accredited to this country or during such time after his recall as is reasonably occupied by him in winding up the affairs of his embassy and leaving the country. See also 4 & 5 Anne, c. 3, s. 19 (Ruffhead, 4 Anne, c. 16); 7 Anne, c. 12, s. 3; and Magdalena Steam Navigation Co. *v.* Martin (1859), 2 E. & E. 94.

(*p*) Davies *v.* Humphreys (1840), 6 M. & W. 153; 4 Jur. 250; but see Wolmershausen *v.* Gullick, [1893] 2 Ch. 514; 68 L. T. 753; and Gardner *v.* Brooke (1897), 2 Ir. R. 6.

(*q*) See Robinson *v.* Harkin, [1896] 2 Ch. 415; 65 L. J. Ch. 773.

(*r*) Collinge *v.* Heywood (1839), 9 A. & E. 633; 1 P. & D. 502; and Huntley *v.* Sanderson (1833), 1 C. & M. 467; 3 Tyr. 469.

(*s*) Reynolds *v.* Doyle (1840), 1 M. & G. 753; 2 Scott, N. R. 45.

In the case of Beck *v.* Pierce (*t*), it was held that the Statute of Limitations runs in favour of a husband who is sued for the ante-nuptial debts of his wife from the time when such debts accrued against her, and not from the date of the marriage. Beck *v.* Pierce.

Where work is done under a general contract, the cause of action accrues and the statute begins to run so soon as the work is done (*u*). But where work is done on the terms that it is to be paid for out of a particular fund, the statute does not begin to run until the fund in question has come to the hands of the defendant (*x*). Work done.

Notice by a creditor of his claim in answer to advertisements by an executor under 22 & 23 Vict. c. 35. s. 29, does not prevent the Statute of Limitations from running (*y*).

Where money is *deposited* with a person *for safe custody, and not by way of loan*, as no right of action arises until demand for its return is made, the statute does not begin to run until such demand (*z*). Deposit or loan.

Persons under the disability of *infancy*, *coverture* (*a*), *insanity*, or *absence beyond seas* (*b*), have *six years' grace* in which to bring their action after the disability has ceased (*c*); but, if the statute has once begun to run, no subsequent disability will suspend its operation (*d*). Disabilities.

When the contract is *under seal*, the time within which the action must be brought is not six but *twenty* years (*e*). Specialty debts in India have no higher legal value than simple contract debts, the same period of limitation, viz., three years, barring the remedy for both. But it has been held that, if an action is brought in England on a bond executed in India, the English Statutes of Limitation apply, and the remedy is not barred till after the lapse of the twenty years (*f*). Deeds. Indian bond sued on in England.

The Real Property Limitation Act, 1874, provides that "no person shall make an entry or distress, or bring an action or suit, to recover any land or rent but *within twelve years* next after the Recovery of land.

(*t*) (1890), 23 Q. B. D. 316; 58 L. J. Q. B. 516.

(*u*) Emery *v.* Day (1834), 1 C. M. & R. 245; 4 Tyr. 695.

(*x*) *Re* Kensington Station Act (1875), L. R. 20 Eq. 197; 32 L. T. 183.

(*y*) *In re* Stephens (1890), 43 Ch. D. 39; 59 L. J. Ch. 109.

(*z*) *In re* Tidd, [1893] 3 Ch. 154; 62 L. J. Ch. 915; Atkinson *v.* Bradford Third Equitable Building Society (1890), 25 Q. B. D. 377; 59 L. J. Q. B. 360.

(*a*) See, however, 45 & 46 Vict. c. 75, as to this disability.

(*b*) See 21 Jac. 1, c. 16, s. 7; and Musurus Bey *v.* Gadban, *supra*.

(*c*) 21 Jac. 1, c. 16, s. 7; and see 19 & 20 Vict. c. 97, s. 10.

(*d*) Homfray *v.* Scroope (1849), 13 Q. B. 509; and Rhodes *v.* Smethurst (1840), 6 M. & W. 351; 1 H. & H. 237.

(*e*) 3 & 4 Will. 4, c. 42, s. 3.

(*f*) Alliance Bank of Simla *v.* Carey (1880), 5 C. P. D. 429; 49 L. J. C. P. 781.

time at which the right to make such entry or distress, or to bring such action or suit, shall have accrued to some person through whom he claims; or if such right shall not have accrued to any person through whom he claims, then within twelve years next after the time at which the right to make such entry or distress, or to bring such action or suit, shall have first accrued to the person making or bringing the same" (*g*). In the recent case of Lynes *v.* Snaith (*h*), it was held that where a person is in possession of premises as tenant at will without payment of rent, the fact that the landlord enters the premises without objection on the part of the tenant for the purpose of doing repairs, does not amount to a determination of the will so as to interrupt the acquisition by the tenant of a title under the Statutes of Limitation. The usual disabilities are privileged, but thirty years is the utmost limit allowed, notwithstanding the existence of one of them during the whole period (*i*). By sect. 7 of the same Act a mortgagor is barred at the end of twelve years from the time when the mortgagee took possession, or from the last written acknowledgment. And by sect. 8 money secured by mortgage (*k*), judgment (*l*), or lien, or otherwise charged upon or payable out of land, and legacies are to be deemed satisfied at the end of twelve years if no interest has been paid nor any acknowledgment given in writing in the meantime (*m*). And this limitation applies to the personal remedy on the covenant as well as to the remedy against the land (*k*). Payment in bankruptcy proceedings is not sufficient to take a case out of the section, as there must be such a payment as implies an acknowledgment of liability and a promise to pay the residue (*n*). The payment may be by any person who as between himself and the mortgagor is bound to pay the interest (*o*).

Lynes *v.* Snaith.

Mortgages.

(*g*) 37 & 38 Vict. c. 57, s. 1. See Lyell *v.* Kennedy (1889), 14 App. Cas. 437; 59 L. J. Q. B. 268; *In re* Davis, Evans *v.* Moore, [1891] 3 Ch. 119; 61 L. J. Ch. 85; Warren *v.* Murray, [1894] 2 Q. B. 648; 64 L. J. Q. B. 42; and Barnes *v.* Glenton, [1899] 1 Q. B. 885; 68 L. J. Q. B. 502.

(*h*) [1899] 1 Q. B. 486; 68 L. J. Q. B. 275.

(*i*) See Hounsell *v.* Dunning, [1902] 1 Ch. 512; 71 L. J. Ch. 259.

(*k*) Sutton *v.* Sutton (1882), 22 Ch. D. 511; 52 L. J. Ch. 333; Fearnside *v.* Flint (1883), 22 Ch. D. 511; 52 L. J. Ch. 479; *In re* Powers (1885), 30 Ch. D. 291; 53 L. T. 647; *In re* Frisby (1889), 43 Ch. D. 106; 59 L. J. Ch. 94; and Kirkland *v.* Peatfield, [1903] 1 K. B. 756; 72 L. J. K. B. 355.

(*l*) See Hebblethwaite *v.* Peever, [1892] 1 Q. B. 125; 40 W. R. 318; and Jay *v.* Johnstone, [1893] 1 K. B. 189; 62 L. J. Q. B. 128.

(*m*) See *In re* Clifden, [1900] 1 Ch. 774; 69 L. J. Ch. 478, as to the meaning of "*in the meantime*."

(*n*) Taylor *v.* Hollard, [1902] 1 K. B. 676; 71 L. J. K. B. 278.

(*o*) Bradshaw *v.* Widdrington, [1902] 2 Ch. 430; 71 L. J. Ch. 627.

Interest on judgment.

The period of limitation applicable to the recovery of interest upon a judgment is regulated by 3 & 4 Will. 4, c. 27, s. 42, and only six years' interest is recoverable out of the personal estate of the judgment debtor (*p*).

Trustees.

As to how far trustees are affected by the Statute of Limitations, see sect. 8 of the Trustee Act, 1888 (51 & 52 Vict. c. 59); and *In re* Page, Jones *v.* Morgan, [1893] 1 Ch. 304; 62 L. J. Ch. 592; *In re* Gurney, Mason *v.* Mercer, [1893] 1 Ch. 590; 68 L. T. 289; Thorne *v.* Heard, [1893] 3 Ch. 530; 62 L. J. Ch. 1010; Soar *v.* Ashwell, [1893] 2 Q. B. 390; 69 L. T. 585; Wassel *v.* Leggatt, [1896] 1 Ch. 554; 65 L. J. Ch. 240; *In re* Friend, Friend *v.* Friend, [1897] 2 Ch. 421; 66 L. J. Ch. 737; *In re* Davies, Ellis *v.* Roberts, [1898] 2 Ch. 142; 67 L. J. Ch. 507; *In re* Bowles, [1902] 1 Ch. 244; 71 L. J. Ch. 130.

Acknowledgment by Joint Contractor, &c.

WHITCOMB *v.* WHITING. (1781) [97]

[2 Dougl. 652.]

Whiting and Jones made a joint and several promissory note, which in the course of time came into the hands of the plaintiff. Eight or ten years after the day on which it was made, the plaintiff sued Whiting, who had long ago forgotten his little undertaking. "Yes," said Whiting, "that certainly must be my signature, and, now you come to mention it, I *do* remember something about a promissory note. But, you see, the date of that note is more than six years ago; so I have the law of you." "That's all very fine, Mr. Whiting," replied the holder, "but Mr. Jones, the gentleman whose name is with yours on this bit of paper, has paid interest on it within the last six years; and that takes it out of the statute *as against you as well as against him.*"

(*p*) See M'Donnell *v.* Fitzgerald (1897), 1 Ir. R. 556.

And so it proved. "Payment by one," said my Lord Mansfield, "is payment for all, the one acting virtually as agent for the rest." "The defendant," said Willes, J., "has had the advantage of the partial payment, and therefore must be bound by it."

By Lord Tenterden's Act (9 Geo. 4, c. 14) partly, and by the Mercantile Law Amendment Act (19 & 20 Vict. c. 97, s. 14) completely, the doctrine of this case was altered; and a Mr. Whiting of to-day would not be prejudiced by the payment or other acknowledgment of a joint contractor, but would be able to shelter himself behind the Statute of Limitations.

Godwin *v.* Parton.

In a modern case (*q*), in which the question was whether one of two partners must be presumed, in the absence of proof to the contrary, to have authority to make a payment on account of a debt due by the firm, so as to take the debt out of the Statute of Limitations as against the other—held, that he must,—Lush, J., said: "The cases on the subject, which, of course, vary in their circumstances, are no guide to the decision of this or of any other case, except so far as they develop the principle which ought to be applied. They lay down the following conditions as necessary to constitute a part payment so as to prevent the operation of the statute.

"*First*, the payment must be shown to have been a payment of part, as part, of a larger sum; a payment which, though not in fact sufficient to cover the demand, was made on the supposition that it was sufficient, or which was accompanied with expressions or circumstances showing that the debtor did not intend ever to pay more, will not suffice.

"*Secondly*, the payment must have been made on account of, or must, with the assent of the debtor, have been appropriated to the debt sought to be recovered.

"*Thirdly*, since the Mercantile Law Amendment Act (19 & 20 Vict. c. 97), payment by one of two joint debtors, though professedly made on behalf of both, will not prevent the statute running in favour of the other, unless it appears that he either authorised or adopted it as a payment by him as well as by his co-debtor."

Watson *v.* Woodman.

In Watson *v.* Woodman (*r*), it was held that a payment by one

(*q*) Godwin *v.* Parton (1880), 41 L. T. 91. See also *In re* Wolmershausen (1890), 62 L. T. 541; 38 W. R. 537; and Gardner *v.* Brooke (1897), 2 Ir. R. 6.

(*r*) (1875), L. R. 20 Eq. 721; 45 L. J. Ch. 57. See, however, *In re* Tucker, [1894] 3 Ch. 429; 63 L. J. Ch. 737.

of a firm of partners will renew the liability of all the others, by reason of the agency of a partner to act for the firm; but that a dissolution revokes the agency, and a subsequent payment is inoperative to charge a former partner.

Barnes *v.* Glenton.

And reference may be made to the recent case of Barnes *v.* Glenton (*s*). A trustee, together with his co-trustees, in 1882 executed a declaration of trust (in which they were not described as trustees) that certain moneys advanced to them should be a first charge upon certain transferred mortgage securities, and in the same year retired from the trust. Payment of interest was continued by his former co-trustees up till 1896. And the Court held that such payment kept alive a claim against such retiring trustee at the instance of those who made the advance, for money lent due under a deed, and disentitled him to the protection of sect. 3 of the Limitation Act, 1623, and sect. 14 of the Mercantile Law Amendment Act, 1856 (*t*), as to payments made by co-contractors or co-debtors.

Mortgagors.

In a mortgage deed of land, dated in 1853, A. & B., the mortgagors, jointly and severally covenanted with C., the mortgagee, for payment of principal and interest. Interest was paid by A. to the time of action brought. Neither principal nor interest was paid by B. In an action on the covenant against A. & B., it was held that the payments by A. prevented the Statute of Limitations running in favour of B. (*u*).

Discharge of Servants.

TURNER *v.* MASON. (1845) [98]

[14 M. & W. 112; 14 L. J. Ex. 311.]

Turner was housemaid in the defendant's service. Her mother became ill and likely to die, and Turner asked her master's permission to go and see her. Mason refused it; so the girl went without it. For this disobedience Mason

(*s*) [1898] 2 Q. B. 223; 67 L. J. Q. B. 731.

(*t*) 19 & 20 Vict. c. 97.

(*u*) Bailie *v.* Irwin (1897), 2 Ir. R. 614.

dismissed her, and she now brought an action for wrongful dismissal, urging that it was a moral duty to go and visit a dying mother. Judgment, however, was given for the defendant, on the ground that the girl had been guilty of *wilful disobedience*, for which her master had a right to dismiss her.

Disobedience.

Similarly, a master has been held to be justified in dismissing a servant where a farm servant refused to work at dinner time (*x*), or refused to work during harvest without beer (*y*); where a sailor refused to work the ship except to an English port (*z*); and where the messman of a regiment refused to send up dinner (*a*). On the other hand, *a servant is entitled to disobey unlawful commands.* "If the plaintiff's wife," said Parke, B., in one case (*b*), "had been requested to work during church time [at the trade of a dyer], and had obstinately refused, that would have been to her credit." And *occasional disobedience in matters of trifling importance*, such as not answering a bell, or stopping at one hotel when told to stop at another, will not warrant a master in dismissing without notice (*c*), though, of course, he will take the earliest opportunity of terminating so unsatisfactory a connection.

In addition to the case of wilful disobedience, a servant may be discharged without wages or notice in the following cases :—

Misconduct.

(1.) When he has been guilty of *gross moral misconduct.*

Of course, morality is matter of degree and opinion; what a man of the world would treat lightly, an old maid might consider very wicked. But about some things everybody would agree. Thus, if a servant is in the habit of getting drunk (*d*), or robs his master (*e*), or tries to ravish the cook (*f*), he can be turned out of the house at once. Whether a maid-servant can be discharged for pregnancy (*g*), or a man-servant for becoming the father of a bastard (*h*), is more doubtful. It is not any excuse that the immorality was not in any way connected with the master's business, and could not prejudice

(*x*) Spain *v.* Arnott (1817), 2 Stark. 256; 19 R. R. 715.
(*y*) Lilley *v.* Elwin (1848), 1 Q. B. 742; 17 L. J. Q. B. 132.
(*z*) Reuno *v.* Bennett (1842), 3 Q. B. 768.
(*a*) Churchward *v.* Chambers (1860), 2 F. & F. 229.
(*b*) Jacquot *v.* Bourra (1839), 7 Dowl. 348; 3 Jur. 776.
(*c*) Callo *v.* Brouncker (1831), 4 C. & P. 518.
(*d*) Wise *v.* Wilson (1845), 1 C. & K. 662.
(*e*) Baillie *v.* Kell (1838), 4 Bing. N. C. 638; 6 Scott, 379.
(*f*) Atkin *v.* Acton (1830), 4 C. & P. 208.
(*g*) Connors *v.* Justice (1862), 13 Ir. C. L. R. 451.
(*h*) R. *v.* Welford (1778), Cald. 57.

it. But the discovery of a servant's dishonesty in a previous situation is not alone sufficient ground of dismissal (*i*).

Pearce *v.* Foster.

The case of Pearce *v.* Foster (*k*) was an action for wrongful dismissal. The defendants were general merchants and commission agents, and the plaintiff had been their confidential clerk. They dismissed him because they found that he was speculating in a wild sort of way on the Stock Exchange, and, although he had continued to discharge his duties in a thoroughly efficient manner, they did not feel that they could repose further confidence in him. It was held that the defendants were perfectly justified in having dismissed him.

It is a good defence to an action for breach of a covenant in an apprenticeship deed by the master to keep, teach, and maintain his apprentice, that the apprentice, while in the master's service, was an habitual thief (*l*).

Inattention.

(2.) When he *does not give proper attention* to his master's business. If, for instance, a servant is never found when wanted, and often sleeps out without leave, he may be discharged (*m*); but not for a mere temporary absence producing no serious inconvenience to the master; *e.g.*, if the French teacher returns to school after the holidays a day or two after the time of reassembling, the school business not having been thereby suspended or impeded (*n*). "It is a question of fact," said Vaughan, J., in a case (*o*) where the acting manager of Covent Garden theatre brought an action for wrongful dismissal, "whether the plaintiff was so conducting himself as that it *would have been injurious to the interests of the theatre to have kept him*. If he was, I should have no difficulty in saying that it would be good ground of dismissal." And it has recently been held (*p*) that a single instance of forgetfulness by a servant, by reason of which damage is caused to a valuable machine of which he has the care and management, may constitute such neglect of duty as to justify his master in dismissing him without notice.

Incompetence.

(3.) When he is *not up to his work*.

"The public profession of an art," said Willes, J., in Harmer *v.* Cornelius (*q*), where a man had been engaged as a scene-painter,

(*i*) Andrews *v.* Garstin (1861), 31 L. J. C. P. 15; 4 L. T. 580.

(*k*) (1886), 17 Q. B. D. 537; 55 L. J. Q. B. 306.

(*l*) Learoyd *v.* Brook, [1891] 1 Q. B. 431; 60 L. J. Q. B. 373.

(*m*) Robinson *v.* Hindman (1800), 3 Esp. 235. See also Boston Deep Sea Co. *v.* Ansell (1888), 39 Ch. D. 339; 59 L. T. 345.

(*n*) Fillieul *v.* Armstrong (1837), 7 A. & E. 557; 2 N. & P. 406.

(*o*) Lacy *v.* Osbaldiston (1837), 8 C. & P. 80.

(*p*) Baster *v.* London & County Printing Works, [1899] 1 Q. B. 901; 68 L. J. Q. B. 622.

(*q*) (1858), 5 C. B. N. S. 236; 28

"is a representation and undertaking to all the world that the professor possesses the requisite ability and skill. An express promise or express representation in the particular case is not necessary. It may be, that if there is no general and no particular representation of ability and skill, the workman undertakes no responsibility. If a gentleman, for example, should employ a man that is known never to have done anything but sweep a crossing to clean or mend his watch, the employer probably would be held to have incurred all risk himself." So a clerk could not be discharged because he could not drive; he might fairly reply "non hæc in fœdera veni."

Illness, if permanent, is ground for dismissal; but not if merely temporary (*r*).

Claim to be partner.

(4.) When he *claims to be a partner*.

The common sense of this ground of dismissal is obvious. By claiming to be a partner the servant has put himself in a position inconsistent with that in respect of which he claims wages (*s*).

So, too, a servant may be dismissed for trying to dissuade his master's customers or clients from dealing with him (*t*).

Although the master may not have assigned any one of these reasons at the time of the dismissal, and may not even have known that such reason existed, he is not thereby precluded from relying on one of them when the servant brings his action for wrongful dismissal (*u*). But if a master condones an act of misconduct which would have justified him in discharging his servant, he cannot afterwards discharge him for the same act (*x*).

Discharged servant's right to wages.

A servant discharged for an act of misconduct does not forfeit his title to *wages already accrued due*. If a man, for instance, is engaged at a salary of £50 a month, there is a vested right, which cannot be affected by subsequent misconduct, to the £50 at the end of each month (*y*). The terms of the hiring, however, may have disturbed this right (*z*). As to wages accruing but not yet accrued due, a servant discharged for misconduct cannot recover anything for the portion of the term he has served.

Notice.

A word may be said as to the notice which servants are entitled

L. J. C. P. 85. And see Horton *v.* McMurtry (1860), 29 L. J. Ex. 260; 5 H. & N. 667.

(*r*) Cuckson *v.* Stones (1859), 1 E. & E. 248; 28 L. J. Q. B. 25.

(*s*) Amor *v.* Fearon (1839), 9 A. & E. 548; 1 P. & D. 398.

(*t*) Mercer *v.* Whall (1845), 5 Q. B. 447; 14 L. J. Q. B. 267.

(*u*) Ridgway *v.* Hungerford Market Co. (1835), 3 A. & E. 171; 4 N. & M. 797; Spotswood *v.* Barrow (1850), 5 Exch. 110; 19 L. J. Ex. 226.

(*x*) Per Blackburn, J., in Phillips *v.* Foxall (1872), L. R. 7 Q. B. 666; 41 L. J. Q. B. 293.

(*y*) Button *v.* Thompson (1869), L. R. 4 C. P. 330; 38 L. J. C. P. 225.

(*z*) See Walsh *v.* Walley (1874), L. R. 9 Q. B. 367; 43 L. J. Q. B. 102.

to. If the hiring is a general one, it is presumed to be for a year, and the servant cannot be dismissed (except, of course, for misconduct) till the year has expired (*a*), and a *reasonable* notice must be given, which must expire with the current year of hiring; a quarter's notice would be amply sufficient, and a month's notice is often all that is required by custom and usage (*b*). Custom and special circumstances, however, may rebut this presumption. Thus, if the wages are payable weekly, it may be found a weekly hiring, and a week's notice is sufficient (*c*). A clerk can be discharged with three months' notice, and a menial servant with one. A custom that either master or servant may determine domestic service at the end of the first month by notice given at or before the expiration of the first fortnight, is not in itself unreasonable, but inasmuch as such a custom has not yet been so fully established that judicial notice can be taken of it, it must be proved in each case as a question of fact (*d*). The term "menial servant" has been held to include a head gardener residing in a detached house in his master's grounds (*e*), and a huntsman (*f*); but not a governess (*g*). In the case of an advertising agent, a month's notice was found to be sufficient (*h*). In Vibert *v.* Eastern Telegraph Co. (*i*), the plaintiff was a stationery clerk in a telegraph office at a salary of £135, payable fortnightly. On its being left to the jury to say what was a reasonable notice to a person in his position, they found that a month was. An indefinite hiring by piece-work cannot be considered a yearly hiring (*k*).

Must try to get other employment.

It is to be observed that a servant wrongfully dismissed is not to receive as a matter of course his full wages for the unexpired term. The amount is to be cut down by his chances of getting other employment, and may be only nominal (*l*), and he is expected to do his best to get such other employment (*m*). As to the measure of

Damages.

(*a*) Buckingham *v.* Surrey Canal Co., W. N. (1882), p. 104.

(*b*) Williams *v.* Byrne (1837), 7 Ad. & E. 177; 6 L. J. K. B. 239; Brown *v.* Symons (1859), 8 C. B. N. S. 208; 29 L. J. C. P. 251. And see Fairman *v.* Oakford (1859), 5 H. & N. 635; 29 L. J. Ex. 459; Creen *v.* Wright (1875), 1 C. P. D. 591.

(*c*) Baxter *v.* Nurse (1844), 6 M. & G. 935; 13 L. J. C. P. 82.

(*d*) Moult *v.* Halliday, [1898] 1 Q. B. 125; 67 L. J. Q. B. 451.

(*e*) Nowlan *v.* Ablett (1835), 2 C. M. & R. 54; 5 Tyr. 709.

(*f*) Nicholl *v.* Greaves (1864), 17 C. B. N. S. 27; 33 L. J. C. P. 259.

(*g*) Todd *v.* Kerrich (1852), 8 Ex. 151; 22 L. J. Ex. 1.

(*h*) Hiscox *v.* Batchellor (1867), 15 L. T. 543.

(*i*) (1883), 1 C. & E. 17.

(*k*) R. v. Woodhurst (1818), 1 B. & Ald. 325.

(*l*) See Brace *v.* Calder, [1895] 2 Q. B. 253; 64 L. J. Q. B. 582.

(*m*) Hartland *v.* General Exchange Bank (1866), 14 L. T. 863; and see Reid *v.* Explosives Co. (1887), 19 Q. B. D. 264; 56 L. J. Q. B. 68, 388.

damages recoverable by a servant who has been wrongfullly dismissed, the case of Maw *v.* Jones (1890), 25 Q. B. D. 107; 59 L. J. Q. B. 542, should be referred to.

In Gordon *v.* Potter (*n*), it was held that a domestic servant (a cook accused of drunkenness) discharged without reason was entitled to the wages accruing up to the time of her discharge, and to a calendar month's wages in addition, but not to board wages for the month.

Employer's duty to provide work.

As to the duty of an employer to find work for his servant, reference should be made to the cases of Rhodes *v.* Forwood (1876), 1 App. Cas. 256; 47 L. J. Ex. 396; Turner *v.* Goldsmith, [1891] 1 Q. B. 544; 60 L. J. Q. B. 247; Turner *v.* Sawdon, [1901] 2 K. B. 653; 70 L. J. K. B. 897; and Northey *v.* Trevillion, [1902] 7 Com. Cas. 201.

Servant improperly quitting service.

As to the master's right to bring an action against his servant for improperly quitting the service, see Lees *v.* Whitcomb (1828), 5 Bing. 34; 3 C. & P. 289; Messiter *v.* Rose (1853), 13 C. B. 162; 22 L. J. C. P. 78; and Holmes *v.* Onion (1857), 2 C. B. N. S. 790; 26 L. J. C. P. 261. Reference should also be made to the Conspiracy and Protection of Property Act, 1875 (*o*), sects. 4 and 5, which render criminal breaches of contract of service involving the risk of injury to persons or property; and also to the Employers and Workmen Act, 1875 (*p*). As to his right to sue a third person who interrupts the relation, see Terry *v.* Hutchinson, *post*, p. 532; and Lumley *v.* Gye, *post*, p. 603.

Seduction of servant.

Contract to Marry.

[99] ATCHINSON *v.* BAKER. (1797)

[PEAKE, ADD. CA. 103.]

Mrs. Baker yielded to the persuasions of Mr. Atchinson, and promised to marry him. When the promise was made the plaintiff was apparently in good health, but the

(*n*) (1859), 1 F. & F. 644.

(*o*) 38 & 39 Vict. c. 86.

(*p*) 38 & 39 Vict. c. 90. And see James *v.* Evans, [1897] 2 Q. B. 180; 66 L. J. Q. B. 742; and Wynnstay Collieries *v.* Edwards (1898), 79 L. T. 378; 62 J. P. 823.

defendant afterwards discovered that he was suffering from an abscess, and refused to marry him. Mr. Atchinson brought an action for breach of promise, and the trial elicited some valuable remarks from Lord Kenyon: "If the condition of the parties is changed after the time of making the contract, it is a good cause for either party to break off the connection. Lord Mansfield has held that if, after a man has made a contract of marriage, the woman's character turns out to be different from what he had reason to think it was, he may refuse to marry her without being liable to an action, and whether the infirmity is bodily or mental, the reason is the same; it would be most mischievous to compel parties to marry who can never live happily together."

In spite of the dictum just quoted, it is doubtful if a defendant can ever get out of his promise to marry by disparaging *himself*. In Hall *v.* Wright (*q*), the defendant pleaded that since his promise he had become afflicted with a dangerous bodily disease, which had occasioned frequent and severe bleeding from the lungs, and, in short, that he was totally unfit for marriage. But the judges festively told him that *perhaps the lady might like to be his widow*, and that his plea was no answer to the action. To get out of his promise the defendant should level his abuse, not at himself, but at the plaintiff. If, for example, after he has given his promise he discovers (and evidence of general reputation is admissible) (*r*) that the plaintiff is a person of poor morality (*s*), or if the promise was induced by the plaintiff's material misrepresentations as to her family, position, or previous life (*t*), he has a good defence. But it will not be a defence to show that at the time he promised to marry the plaintiff he did not know that she had been in an asylum (*u*), or engaged to another man (*x*). Most of the defences which are open to men, are open to women too; but, of course, it would be necessary for a woman defendant to fix the plaintiff

Hall *v.* Wright.

Defences to action.

(*q*) (1858), E. B. & E. 746; 29 L. J. Q. B. 43.

(*r*) Foulkes *v.* Sellway (1800), 3 Esp. 236.

(*s*) Irving *v.* Greenwood (1824), 1 C. & P. 350.

(*t*) Wharton *v.* Lewis (1824), 1 C. & P. 529; 28 R. R. 785.

(*u*) Baker *v.* Cartwright (1861), 10 C. B. N. S. 124; 30 L. J. C. P. 364.

(*x*) Beachey *v.* Brown (1860), E. B. & E. 796; 29 L. J. Q. B. 105.

with much more than mere sexual immorality before she would be entitled to disregard her promise. It will be a good defence, also, to an action against a woman that, after she had made the promise, the plaintiff manifested a violent temper, and threatened to ill-use her (*y*).

Exoneration.

Another defence to an action for breach of promise is that the thing was off. This exoneration from the promise may be implied from the conduct of the parties; if, for instance, there has been neither intercourse nor correspondence for a year or two, the jury would naturally draw the inference that there was an end of the engagement, even though the amorous letters were not returned (*z*).

A promise to marry need not be in writing (*a*), but the plaintiff's testimony *must be corroborated* by some other material evidence (*b*).

Corroboration.

Not long ago a woman overheard a conversation between her sister and a man, in the course of which the sister exclaimed, "*You always promised to marry me, but you never keep your word.*" Instead of indignantly denying that he had ever made such a promise, the man *remained silent*. This eavesdropper's evidence was held sufficiently "corroborative" in the action which her sister soon afterwards brought (*c*). But the mere fact that the defendant did not answer letters written to him by the plaintiff, in which she stated that he had promised to marry her, is no evidence corroborating the plaintiff's testimony in support of such promise, within the meaning of 32 & 33 Vict. c. 68, s. 2 (*d*).

Promise by married man actionable.

A married man may be sued on a promise to marry, if the woman did not know he was married (*e*).

Infants.

An infant may sue, but cannot be sued for breach of a promise to marry. In order to bind an infant after attaining majority, there must be a new promise as distinguished from a mere ratification of the promise made during infancy (*f*).

An action for breach of promise of marriage will lie by or against the personal representatives of the party to or by whom the promise was made, provided special damage to the plaintiff's estate,

(*y*) Leeds *v.* Cook (1803), 4 Esp. 258; 6 R. R. 855.

(*z*) Davis *v.* Bomford (1860), 6 H. & N. 245; 30 L. J. Ex. 139.

(*a*) Harrison *v.* Page (1699), Ld. Raym. 387.

(*b*) 32 & 33 Vict. c. 68, s. 2.

(*c*) Bessela *v.* Stern (1877), 2 C. P. D. 265; 46 L. J. Ch. 467.

(*d*) Wiedemann *v.* Walpole, [1891] 2 Q. B. 534; 60 L. J. Q. B. 762.

(*e*) Wild *v.* Harris (1849), 7 C. B. 999; 18 L. J. C. P. 297.

(*f*) See the Infants' Relief Act, 1874; Coxhead *v.* Mullis (1878), 3 C. P. D. 439; 47 L. J. C. P. 761; Northcote *v.* Doughty (1879), 4 C. P. D. 385; Ditcham *v.* Worrall (1880), 5 C. P. D. 410; 49 L. J. C. P. 688; Holmes *v.* Brierley (1888), 36 W. R. 795.

contemplated by both parties at the time of the promise, is proved (*g*).

Fancy damages may be given in an action for breach of promise; *e.g.*, the defendant's pecuniary position and the girl's wounded feelings may be taken into account (*h*). In fact, the measure of damages is rather as if the action were in tort than in contract. Damages.

The Foreign Marriage Act, 1892 (55 & 56 Vict. c. 23), consolidates the enactments relating to the marriage of British subjects outside the United Kingdom.

Suing before the Day of Performance.

HOCHSTER *v.* DE LA TOUR. (1853) [100]

[2 E. & B. 678; 22 L. J. Q. B. 455.]

Mr. De la Tour, meditating a visit to the Continent, engaged Hochster as his courier at £10 a month, the service to commence on June 1st. Before that day came, however, Mr. De la Tour altered his mind, and told Hochster he did not want him. Without wasting words or letting the grass grow under his feet, and before June 1st, Hochster issued his writ in an action for breach of contract. For De la Tour it was argued that Hochster should have waited till June 1st before bringing his action, for that the contract could not be considered to be broken till then. It was held, however, that the contract had been sufficiently broken by De la Tour's *saying definitely that he renounced* the agreement.

Generally speaking, no action for the breach of an executory contract can be brought till the day of performance arrives. But

(*g*) Chamberlain *v.* Williamson (1814), 2 M. & S. 408; Finlay *v.* Chirney (1888), 20 Q. B. D. 494; 57 L. J. Q. B. 247.

(*h*) Smith *v.* Woodfine (1857), 1 C. B. N. S. 660; and Berry *v.* Da Costa (1866), L. R. 1 C. P. 331; 35 L. J. C. P. 191.

if one of the parties *puts it out of his power* to perform it, or *expressly renounces* the contract, the day of performance need not be waited for (*i*).

Putting it out of power to perform.

If a young lady agrees to marry me on May 10th, and, in defiance of that arrangement, marries Jones on April 1st, I may bring an action against her as soon as I like after April 1st, although it is quite possible that before May 10th comes she may be a widow and quite at my service (*k*).

Distinct repudiation.

So, too, of an *express renunciation*. A man told a lady, with whom he proposed marriage, that, though he could not do so immediately, he *would marry her directly his father died*. Soon afterwards he repented of this promise, and, in the lifetime of his father, told the lady frankly that he retracted his promise, and did not intend ever to marry her. The judges, following Hochster *v.* De la Tour, decided that the contract was broken immediately on the defendant's renouncing it in the way he did (*l*). The renunciation, however, to entitle the plaintiff to sue, must be precise and clear (*m*).

Exoneration by breach.

In an action for not accepting, or for not delivering, goods according to contract, it often becomes a practical question whether a partial breach by one party exonerates the other from further performance. The cases on this subject are not consistent, and it becomes a matter of considerable difficulty to ascertain precisely the principles by which the Court is guided in deciding disputes of this nature. And the difficulty is not removed by the Sale of Goods Act, 1893 (*n*), sect. 31 (2), which provides that "Where there is a contract for the sale of goods to be delivered by stated instalments, which are to be separately paid for, and the seller makes defective deliveries in respect of one or more instalments, or the buyer neglects or refuses to take delivery of or pay for one or more instalments, it is a question in each case, depending on the terms of the contract and the circumstances of the case, whether the breach of contract is a repudiation of the whole contract or whether it is a

(*i*) See Synge *v.* Synge, [1894] 1 Q. B. 466; 63 L. J. Q. B. 202.

(*k*) Short *v.* Stone (1846), 1 Q. B. 371; 15 L. J. Q. B. 143.

(*l*) Frost *v.* Knight (1872), L. R. 7 Ex. 111; 41 L. J. Ex. 78; and see Cherry *v.* Thompson (1872), L. R. 7 Q. B. 573; and Roper *v.* Johnson (1873), L. R. 8 C. P. 167; 42 L. J. C. P. 65.

(*m*) See Avery *v.* Bowden (1855), 6 E. & B. 962; 26 L. J. Q. B. 3. In Johnstone *v.* Milling (1886), 16 Q. B. D. 460; 55 L. J. Q. B. 162, it was "*queried*" whether the doctrine of the leading case as to anticipatory breach of contract applies to a covenant in a lease containing many covenants, or to any case where upon a refusal by one party to perform a particular covenant the other cannot put an end to the contract in its entirety.

(*n*) 56 & 57 Vict. c. 71.

severable breach giving rise to a claim for compensation, but not to a right to treat the whole contract as repudiated." In Simpson *v.* Crippin (*o*), where goods were to be delivered by the defendant to the plaintiff in twelve equal monthly parcels, it was held that the refusal, only, of the plaintiff to accept the first parcel did not exonerate the defendant from delivering the remaining parcels. And in Freeth *v.* Burr (*p*), where the delivery was to be by two equal parcels, the defendant was held not to be released from the delivery of the second parcel by the plaintiff having refused to pay for the first in accordance with the contract. The true question, perhaps, in each case is *whether the conduct of the one party amounts or not to an intimation of intention to abandon and altogether refuse performance* (*q*). In America the law appears to be fairly settled in accordance with the decisions in Hoare *v.* Rennie and Honck *v.* Muller rather than those of Simpson *v.* Crippin and Freeth *v.* Burr. The judgments in Norrington *v.* Wright (*r*), decided by the Supreme Court of the United States, contain an exhaustive and learned discussion of the English decisions, and are well worthy of attentive perusal.

(*o*) (1872), L. R. 8 Q. B. 14; 42 L. J. Q. B. 28, where Hoare *v.* Rennie (1859), 5 H. & N. 19; 29 L. J. Ex. 73, was not followed; and see Honck *v.* Muller (1884), 7 Q. B. D. 92; 50 L. J. Q. B. 529.

(*p*) (1874), L. R. 9 C. P. 208; 43 L. J. C. P. 91.

(*q*) Mersey Steel and Iron Co. *v.* Naylor (1884), 9 App. Cas. 434; 53 L. J. Q. B. 497; and see Rhymney Ry. *v.* Brecon Junction Ry. (1900), 69 L. J. Ch. 813; 83 L. T. 111. See Benj. on Sale, pp. 584—592 (4th ed.).

(*r*) (1885), 8 Davis (115 U. S.), 189; followed in Cleveland Rolling Mills *v.* Rhodes (1886), 14 Davis (121 U. S.), 255; and Pope *v.* Porter (1886), 102 N. Y. 366. See Pollock on Contracts, p. 270 (7th ed.).

DAMAGES.

Measure of Damages in Contract.

[101] HADLEY *v.* BAXENDALE. (1854)

[9 Exch. 341; 23 L. J. Ex. 179.]

Hadley & Co. were millers at Gloucester, and worked their mills by a steam engine. In May, 1853, the crank shaft of the engine broke, and their mills suddenly came to a standstill. With a view to remedying the disaster, they communicated immediately with Joyce & Co., engineers, of Greenwich, and settled to send them the broken shaft that it might form the pattern for a new one. They then sent a servant to the office of the defendants, a firm of carriers, to arrange for the carriage of the broken shaft. The servant found a clerk at the office, who informed him that, if sent any day before twelve o'clock, the shaft would be delivered the next day at Greenwich. On the following day, accordingly, before noon, the shaft was received by the defendants for the purpose of being conveyed to Greenwich, and £2 4*s*. was paid for its carriage for the whole distance. It happened, however, through the negligence of the defendants, that the shaft was *not* delivered the next day at Greenwich; and the consequence was that Hadley & Co. did not get

the new shaft till several days after they otherwise would have done, the mills in the meantime remaining idle, to the not small pecuniary loss of their proprietors.

It was for the loss of those profits which they would have made if the new shaft had come to them when they expected it that this action was brought; and the question was whether the damages were too remote. It was held that if the carriers had been made aware that a loss of profits would result from delay on their part, they would have been answerable. But it did not appear that they knew that the want of the shaft was the only thing which was keeping the mills idle. Therefore they were not liable.

Damages arising naturally.

The damages recoverable for breach of contract are those which arise naturally from the breach, or, as has been said, are such as *may be reasonably supposed to have been in the contemplation of the parties at the time the contract was made as the probable result of a breach of it.* Baron Martin (*a*), however, objected to the latter test of damage, on the ground that parties, when they make a contract, contemplate *fulfilling* and not *breaking* it.

Three great rules.

Three rules are generally considered to be deducible from the leading case of Hadley *v.* Baxendale (*b*).

(1.) *Damages which may fairly be deemed such as would directly and naturally* (*c*) *arise from a breach of the contract, in the usual course of things, are recoverable.*

Thus, in an action (*d*) for not accepting goods sold, or for not delivering them, the measure of damages is *the difference between the contract price and the market price of similar goods at the time when they ought to have been accepted or delivered.* And where the contract is to deliver goods in *specified quantities at specified periods* (*e*), as each period arrives, if no delivery or only a partial delivery takes place, the damages will be the difference between the contract price

(*a*) Prehn *v.* Royal Bank of Liverpool (1870), L. R. 5 Ex. at p. 100; 39 L. J. Ex. 41.

(*b*) The measure of damages on the breach of a contract for the sale of goods is dealt with in sects. 50—54 of the Sale of Goods Act, 1893 (56 & 57 Vict. c. 71).

(*c*) McMahon *v.* Field (1881), 7 Q. B. D. 591; 50 L. J. Q. B. 852; Welch *v.* Anderson (1892), 61 L. J. Q. B. 167; 66 L. T. 442.

(*d*) Valpy *v.* Oakley (1851), 16 Q. B. 941; 20 L. J. Q. B. 380; Ogle *v.* Vane (1868), L. R. 2 Q. B. 275; 3 Q. B. 272; 37 L. J. Q. B. 77.

(*e*) Brown *v.* Muller (1872), L. R. 7 Ex. 319; 41 L. J. Ex. 214; and see Roth *v.* Taysen (1896), 73 L. T. 628; 8 Asp. M. C. 120.

and the market price on that day of the quantity which ought to have been then supplied. In the case of Smith *v.* Green (*f*) a cow was sold with a warranty that it was free from disease. As a matter of fact, it had the foot-and-mouth disease, and infected a number of other cows belonging to the purchaser. All the cows died, and the vendor was held responsible for the entire loss, on the ground that he could never have supposed that the cow he sold was intended for a life of solitary confinement. He must have known that the breach of warranty would, in all probability, lead to the result which actually followed. And on this ground, the recent case of Vogan *v.* Oulton (*g*) was decided. The plaintiff hired some sacks from the defendant to unload a cargo of peas. While one sack was being hoisted out of the ship it gave way, and a labourer named B. was injured. B. brought an action against the present plaintiff and recovered £25 and costs. An appeal against this decision was dismissed with costs. It was held, that inasmuch as the injuries to B. were the natural consequence of the defendant's implied breach of warranty, upon which the plaintiff was entitled to rely, and the action against the present plaintiff not having been unreasonably defended, the plaintiff could recover against the defendant the £25 damages, the costs he had to pay B., and his own costs, but not the costs of the appeal.

Diseased cow warranted free from disease.

The sack of peas.

The disappointing orchid.

In a recent case (*h*), a man bought an orchid at an auction for twenty guineas with the warranty that it was "*Cattleya Acklandiæ alba*, only known plant." After two years it flowered, and produced not a white, but a purple flower. The value of such a plant is 7*s.* 6*d.* In an action for breach of warranty, the County Court judge found as a fact, that if the orchid had been an actual *alba*, it was at the time of sale worth £50; but that until it showed its real nature there was no probability that an orchid grower would give more than twenty guineas for it. It was held, upon this finding, that the buyer was entitled to judgment for £50.

So, too, any increased cost to which a person is put from the necessity of doing himself what he had contracted that someone else should do for him is recoverable, if what he does is the fair and reasonable thing to do under the circumstances. On this point Le Blanche *v.* London and North Western Railway Co. may be consulted (*i*).

(*f*) (1875), 1 C. P. D. 92; 45 L. J. C. P. 28; and see Mullett *v.* Mason (1866), L. R. 1 C. P. 559; 35 L. J. C. P. 299.

(*g*) (1898), 79 L. T. 384; following Mowbray *v.* Merryweather, [1895] 2 Q. B. 640; 65 L. J. Q. B. 50.

(*h*) Ashworth *v.* Wells (1898), 78 L. T. 136.

(*i*) *Ante*, p. 321.

(2.) *Damages, not arising naturally, but from circumstances peculiar to the special case, are not recoverable unless the special circumstances were known to the person who has broken the contract.* Special circumstances.

The leading case went off on this point. The special circumstances, although hinted at, were not so fully disclosed that the defendants were aware that the want of the shaft was the only thing which kept the mills idle. The case of Horne *v.* Midland Railway Co. (*k*), well illustrates this rule. Early in 1871 the plaintiffs contracted to supply a quantity of shoes at 4*s.* a pair for the use of the French army. They were to be delivered by a particular day, or they would be thrown back on the plaintiffs' hands. The plaintiffs delivered these shoes in good time at Kettering, and gave notice to the station-master there that they were under contract to deliver on that day, and that, if not so delivered, the shoes would be thrown on their hands; but no further information was given. Somehow, the shoes were not delivered in time, and, doing the best they could, the plaintiffs could not sell the rejected shoes for more than 2*s.* 9*d.* a pair, and the plaintiffs brought this action to recover from the company the difference between 4*s.* and 2*s.* 9*d.* on each pair. It appeared that the ordinary market price had not varied between the day on which the boots were due and the day on which they were received, and it was held that, under the circumstances, the defendants were not liable for the special loss which had arisen. Shoes for the French army.

In another case (*l*), this rule came under consideration in a somewhat anomalous state of circumstances, the parties not having in contemplation the same use for the article to be supplied, which was of a novel character. The defendants agreed to sell to the plaintiff the hull of a floating boom derrick and deliver it at a time fixed. They believed that the plaintiff wanted it as a coal-store, but, as a matter of fact, he intended to use it for the purpose of transhipping coals from colliers into barges. The former was the most obvious use to which such a vessel would be applied, and the defendants had no notice or knowledge of the special object for which it was purchased. The defendants, being late in their delivery of the derrick to the plaintiff, were held liable for the loss of Cory *v.* Thames Ironworks Company.

(*k*) (1873), L. R. 7 C. P. 583; 8 C. P. 131; 42 L. J. C. P. 59; and see Morris *v.* Lond. & West. Bank (1885), 1 C. & E. 498, which was an action to recover damages for the dishonour of a cheque through a mistake of the bankers, the consequence being that a bill discounter refused to deal any longer with the plaintiff's firm. And see Fleming *v.* Bank of New Zealand, [1900] A. C. 577; 69 L. J. P. C. 120.

(*l*) Cory *v.* Thames Ironworks Co. (1868), L. R. 3 Q. B. 181; 37 L. J. Q. B. 68.

such profits as would have been made during the period of delay by the use of the vessel as a coal-store, but not for any further loss or damage that had occurred.

Special circumstances known to party breaking and damage flowing naturally from breach.

(3.) *Where the special circumstances are known to the person who breaks the contract, and the damage complained of flows naturally from the breach under those special circumstances, such special damage is recoverable.*

Qualification of third rule.

But this rule cannot, it seems, be received without the important qualification that (*m*) "The knowledge must be brought home to the party sought to be charged under such circumstances that he must know that the person he contracts with *reasonably believes that he accepts the contract with the special condition* attached to it." And this expression of opinion was subsequently confirmed by Willes, J., in the case of Horne *v.* Midland Railway Co. (*n*), just referred to, and also by the observations of Blackburn, J., when giving judgment in the same case. That learned judge remarked, "In Hadley *v.* Baxendale it is said that, if special notice be given, the damage is recoverable, though there be no special contract, and this has been repeated in various cases; but it is noticeable that there seems to be no case where it has been held that if notice be given abnormal damages may be recovered; and I should be inclined to agree with my brother Martin that they cannot unless there be a contract. But it is not necessary to decide this question, because here, in fact, there was no such notice; the notice here given conveys full information that the day is of consequence, and that the goods should be delivered on the 3rd of February if the defendants could, from which a contract of sale on which there was a profit might be inferred; but there was no notice that the defendants would have to pay the amount of loss claimed. Therefore, it is not necessary to decide whether the dictum in Hadley *v.* Baxendale is law, though I confess that at present I think it a mistake."

Take the case of a defendant who has no option of refusing the contract, and is not at liberty to require a higher rate of remuneration; can it be contended that the mere fact that he proceeded in the contract with knowledge of the special circumstances in itself gives rise to an undertaking to incur a liability for special damages? As, for example, where a railway passenger, on buying his ticket, informs the clerk of some particular loss that would arise on his being late.

(*m*) Per Willes, J., in British Columbia Saw Mill Co. *v.* Nettleship (1868), L. R. 3 C. P. 499; 37 L. J. C. P. 235; and see Hawes *v.* S. E. R. Co. (1884), 54 L. J. Q. B. 179; 52 L. T. 514.

(*n*) *Supra.*

Under the circumstances last supposed the learned author of Mayne on Damages says (*o*) that "Even if there were an express contract by the defendant to pay for special damages, it might be questioned whether such a contract would not be void for want of consideration."

Spice samples too late for show.

There is, however, a case (*p*) which at first sight appears to militate against the views that have just been expressed. An action was brought by a cattle-spice manufacturer against a railway company for not delivering spice samples, &c. which the plaintiff had been exhibiting at a cattle-show at Bedford, in time for another show at Newcastle-on-Tyne. The plaintiff had not distinctly informed the defendants that the samples were intended for exhibition at the Newcastle show, but he had addressed them, "The Show Ground, Newcastle-on-Tyne," and had stated that they must be there on Monday certain, and there could really have been no doubt as to what the man's purpose was. The plaintiff was held entitled to recover damages for the loss which he had sustained by reason of the delay. The learned author to whom reference has just been made observes on this case (*q*): "Notwithstanding some expressions in the judgment, it appears that the case really came under the first rule in Hadley *v.* Baxendale, and not under the third. Goods are consigned with a contract that they are to be delivered at a particular place on a particular day. The contract is broken. What are the damages? They are the damages naturally arising from the non-arrival of the particular sort of goods. The evidence as to knowledge simply went to show that the defendants knew what sort of goods they were. A carrier will be liable to different damages according as he delays a basket of fish or a basket of coals, for the simple reason that delay frustrates the object of sending the fish, but not that of sending the coals. Here the plaintiff claimed no special damages, but merely general damages for the failure of his object in sending the goods."

Arsenic in beer.

The measure of damages, apart from special circumstances, which the manufacturer of an article that has had to be destroyed by the fault of another is entitled to recover, is the price which he could have sold it for on the day that it had to be destroyed. Thus in Holden *v.* Bostock (*r*) it was held that the plaintiffs, who were brewers, were entitled to recover the full selling value of a quantity

(*o*) P. 41 (5th ed.).

(*p*) Simpson *v.* L. & N. W. Ry. Co. (1876), 1 Q. B. D. 274; 45 L. J. Q. B. 182. See also Schulze *v.* G. E. Ry. Co. (1887), 19 Q. B. D. 30; 56 L. J. Q. B. 442.

(*q*) Mayne on Damages, 5th ed. pp. 37, 38.

(*r*) (1902), 50 W. R. 323.

of beer in their cellars which had by the fault of the defendants to be thrown away, and not merely such a sum as they themselves must have expended in order to brew an equal amount of beer of the same quality to replace it.

Debentures. On a contract to take debentures in a company, no action will lie for the money agreed to be lent. An action will only lie for breach of the contract. The measure of the damages is the loss sustained by the company through the breach (*s*).

Stock-broker. As to the measure of damages payable by a broker on the Stock Exchange for breach of agreement to carry over stock, see Michael *v.* Hart, [1902] 1 K. B. 482; 71 L. J. K. B. 265.

Landlord and tenant. Where a lessee has covenanted to leave the premises in repair at the end of the term, the rule as to the measure of damages, on breach of the covenant, is that the damages are such a sum as it will cost to put the premises into the state of repair in which the lessee was bound to leave them (*t*). Under a covenant to keep a house in "good tenantable repair," the tenant's obligation is to keep the premises in such repair as, having regard to the age, character, and locality of the house, would make it reasonably fit for the occupation of a tenant of the class who would be likely to take it (*u*). In estimating the damages recoverable by the covenantee during the currency of a lease in respect of the breach of a covenant to keep the demised premises in repair, all the circumstances must be taken into consideration, and the damages must be assessed at such a sum as reasonably represents the diminution of the value of the reversion by the breach of covenant; and when the covenantee is himself subject to covenants to a superior landlord, and the covenantor has notice of the original lease, the covenantee's liability to his landlord must be taken into account (*x*).

Real estate. As to the measure of damages to which a vendor of real estate is liable for delay in completion and delivery of possession, see Jones *v.* Gardiner, [1902] 1 Ch. 191; 71 L. J. Ch. 93; and the cases there referred to.

Interest. At common law, the creditor, as a general rule, is not entitled to

(*s*) South African Territories *v.* Wallington, [1897] 1 Q. B. 692; 66 L. J. Q. B. 551.

(*t*) See Joyner *v.* Weeks, [1891] 2 Q. B. 31; 60 L. J. Q. B. 510, where it was held that this rule is not affected by the fact that before the expiration of the term the lessor has relet the premises on the expiration of the term to a third person who has covenanted to alter and rebuild the premises; and see Henderson *v.* Thorne, [1893] 2 Q. B. 164; 62 L. J. Q. B. 586.

(*u*) See Proudfoot *v.* Hart (1890), 25 Q. B. D. 42; 59 L. J. Q. B. 389.

(*x*) Conquest *v.* Ebbetts, [1896] A. C. 490; 65 L. J. Ch. 808; and see Ebbetts *v.* Conquest (1900), 82 L. T. 560.

interest. "It is now established, as a general principle, that interest is allowed by law only upon mercantile securities, or in those cases where there has been an express promise to pay interest, or where such promise is to be implied from the usage of trade, or other circumstances" (*y*). There is no implied promise to pay interest on a sale of goods *simpliciter*, and it makes no difference that the sale is on credit, or that a particular date is fixed for payment (*z*). But a contract to pay interest on the price will be implied when the goods are to be paid for by bill, which is not given, and from the date when the bill would have matured (*a*).

By statute, interest is recoverable in certain cases. It is enacted by 3 & 4 Will. 4, c. 42, s. 28, "that upon all debts or sums certain, payable at a certain time or otherwise, the jury, on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, allow interest to the creditor, at a rate not exceeding the current rate of interest, from the time when such debts or sums certain were payable, if such debts or sums be payable by virtue of some written instrument at a certain time, or if payable otherwise, then from the time when demand of payment shall have been made in writing, so as such demand shall give notice to the debtor that interest will be claimed from the date of such demand until the term of payment (*b*). Provided that interest shall be payable in all cases in which it is now payable by law." And sect. 29 provides that "The jury, on the trial of any issue, or on any inquisition of damages, may, if they shall think fit, give *damages in the nature of interest* over and above the value of the goods at the time of the conversion or seizure, in all actions of trover or trespass *de bonis asportatis*, and over and above all money recoverable in all actions on policies of insurance made after the passing of this Act" (*c*).

(*y*) Per Abbott, C. J., in Higgins *v.* Sargent (1823), 2 B. & C. 348; 2 L. J. K. B. 33; and see per Hall, V.-C., in Hill *v.* South Staffordshire Ry. Co. (1874), L. R. 18 Eq. 167; 43 L. J. Ch. 556; and per Lindley, L. J., in L. C. & D. Ry. Co. *v.* S. E. Ry. Co., [1892] 1 Ch. 140; 61 L. J. Ch. 294; and see *In re* Anglesey, [1901] 2 Ch. 548; 70 L. J. Ch. 810.

(*z*) Gordon *v.* Swan (1810), 2 Camp. 429; 12 East, 419; Calton *v.* Bragg (1812), 15 East, 223; 13 R. R. 451.

(*a*) Marshall *v.* Poole (1810), 13 East, 98; 12 R. R. 310; Farr *v.* Ward (1837), 3 M. & W. 25.

(*b*) See Harper *v.* Williams (1843), 4 Q. B. 219, 224; 12 L. J. Q. B. 227; Edwards *v.* G. W. Ry. Co. (1851), 11 C. B. 588; 21 L. J. C. P. 72; Hill *v.* South Staffordshire Ry. Co. (1874), 18 Eq. 154; 43 L. J. Ch. 556; L. C. & D. Ry. Co. *v.* S. E. Ry. Co., [1892] 1 Ch. 120; 61 L. J. Ch. 294; and *In re* Horner, Fooks and Horner, [1896] 2 Ch. 188; 65 L. J. Ch. 694, as to the meaning of the word "certain"; and see Harper *v.* Williams, *supra;* Mowatt *v.* Londesborough (1854), 4 E. & B. 1; 23 L. J. Q. B. 38; and Rhymney Ry. Co. *v.* Rhymney Iron Co. (1890), 25 Q. B. D. 146; 59 L. J. Q. B. 414, as to what is a sufficient "demand."

(*c*) This statute was said by

Other cases.

Other cases on "measure of damages" which may be consulted are Agius *v.* Great Western Colliery Co., [1899] 1 Q. B. 413; 68 L. J. Q. B. 312; following Hammond *v.* Bussey (1887), 20 Q. B. D. 79; 57 L. J. Q. B. 58; Wigsell *v.* School for Indigent Blind (1882), 8 Q. B. D. 357; 51 L. J. Q. B. 330; Thol *v.* Henderson (1881), 8 Q. B. D. 457; Lilley *v.* Doubleday (1881), 7 Q. B. D. 510; 51 L. J. Q. B. 310; Ashdown *v.* Ingamells (1880), 5 Ex. D. 280; 43 L. T. 424; Jenkins *v.* Jones (1882), 9 Q. B. D. 128; 51 L. J. Q. B. 438; Baldwin *v.* L. C. & D. Ry. Co. (1882), 9 Q. B. D. 582; Cassaboglou *v.* Gibb (1883), 11 Q. B. D. 797; 52 L. J. Q. B. 538; Meek *v.* Wendt (1888), 21 Q. B. D. 126; 59 L. T. 558; Grébert-Bognis *v.* Nugent (1885), 15 Q. B. D. 85; 54 L. J. Q. B. 511; The Notting Hill (1884), 9 P. D. 105; 53 L. J. P. 56; Skinner *v.* City of London Marine Insurance Corporation (1885), 14 Q. B. D. 882; 54 L. J. Q. B. 437; Whitham *v.* Kershaw (1885), 16 Q. B. D. 613; 54 L. T. 124; Kiddle *v.* Lovett (1885), 16 Q. B. D. 605; 34 W. R. 518; and Tredegar Iron and Coal Co. *v.* Gielgud (1883), 1 C. & E. 27.

Penalties and Liquidated Damages.

[102] KEMBLE *v.* FARREN. (1829)

[6 Bing. 141; 3 M. & P. 425.]

By an agreement between an actor and a manager, the actor undertook to act as principal comedian at the manager's theatre (Covent Garden) for four seasons, and in all things to conform to the regulations of the theatre; while the manager agreed to pay the actor £3 6*s.* 8*d.* a night, and to allow him a benefit once every season. And the agreement contained this clause, "that if either of the parties should neglect or refuse to fulfil the said

Thesiger, L. J., in Webster *v.* British Empire Assurance Co. (1880), 15 Ch. D. at p. 178; 49 L. J. Ch. 769, to be merely declaratory of the common law. See generally on the question of interest, Mayne on Damages, 5th ed., Chap. IV., pp. 156 *et seq.*

agreement, *or any part thereof, or any stipulation therein contained*, such party should pay to the other the sum of £1,000, to which sum it was thereby agreed that the damages sustained by any such omission, neglect, or refusal should amount; and which sum was thereby declared by the said parties *to be liquidated and ascertained damages, and not a penalty or penal sum, or in the nature thereof.*"

For some reason or other—it does not matter what—during the second season the actor refused to act, and the manager now went to law to recover the whole £1,000 mentioned in the agreement, although he was quite prepared to admit that he had not sustained damage to a greater extent than £750.

The manager, however, did not succeed, for the Court said that it could never be taken to be the intention of the parties that the whole £1,000 should instantly become payable on the happening of any breach, however trifling (*d*).

Question of intention.

It is not always, however, that a Court will interfere in this way and pronounce what the parties—who ought to know best—call *liquidated damages* to be really only a *penalty*. If the agreement, for instance, were not, as it was in Kemble *v.* Farren, one containing *various stipulations of various degrees of importance*, but if there were *only one event* upon which the money was to become payable, or if there were *several events, but the damages impossible accurately to measure*, then no attempt to turn liquidated damages into a mere penalty would be successful; and in such cases it would be of no consequence whether in the contract the sum to be paid in the event of breach was called "a penalty" or "liquidated damages," because the Court will look to the meaning and effect of the contract itself as disclosing *the intention of the parties*, and, having satisfied itself on that point, does not care much for the term they happen to have selected from Johnson's Dictionary (*e*). Illustrations of the unimportance of the language used may be found in the cases of Catton

Only one event.

Damages impossible to measure.

Name immaterial.

(*d*) See 8 & 9 Will. 3, c. 11, s. 8.

(*e*) Per Chambre, J., in Astley *v.* Weldon (1801), 2 B. & P. 354; 5 R. R. 618; and see Sparrow *v.* Paris (1862), 7 H. & N. 594; 31 L. J. Ex. 137; and Law *v.* Redditch Local Board, [1892] 1 Q. B. 127; 61 L. J. Q. B. 172.

v. Bennett (1884), 51 L. T. 70; Elphinstone *v.* Monkland Iron Co. (1886), 11 App. Cas. 332; 35 W. R. 17; and *In re* White and Arthur (1901), 84 L. T. 594; 50 W. R. 81.

Galsworthy *v.* Strutt.

About fifty years ago, two London solicitors dissolved partnership, one of them covenanting not to practise during the next seven years within fifty miles of Ely Place, nor interfere with or influence any of the clients of the late co-partnership; if he in any way infringed the covenant, he was to pay £1,000 "as and for liquidated damages, and not by way of penalty." On breach of this covenant it was held that, no matter how slight the damage was, the whole £1,000 had to be paid (*f*). "Parties," said Parke, B., "are bound by their contracts, if those contracts be clearly made. It is clear that the defendant stipulated to pay £1,000 for the breach of any one of the conditions mentioned; and they are such that *the damage arising from the violation of any of them cannot be exactly estimated beforehand.*"

Sainter *v.* Ferguson.

In Sainter *v.* Ferguson (*g*) the facts were very similar, but the word "penalty" was used in specifying the sum to be paid, and there was only one event on which the money was to become payable. "We can only give effect," said the Court, "to the contract of the parties by holding the £500 to be liquidated damages, and not a mere penalty."

Barton *v.* Capewell Co.

In the case of Barton *v.* Capewell Co. (*h*), under an agreement for the sale of a patent, the sum of £1,400 had been paid as part of the purchase-money; the balance was to be paid in three equal instalments at certain specified times, and in case of default by the purchaser in paying any of the instalments, "all payments made shall be absolutely forfeited to the vendor as and by way of liquidated damages." Default having been made in paying the first instalment, the Court held that the vendor could not retain the £1,400, as that sum was in reality a penalty and not liquidated damages.

Willson *v.* Love.

A good illustration of the rule, that when a contract contains a condition for payment of a sum of money to secure the performance of several stipulations of varying degrees of importance, such sum is *primâ facie* a penalty and not liquidated damages, is to be found in the recent case of Willson *v.* Love (*i*). A lease of a farm contained a covenant by the lessees not to sell hay or straw off the premises during the last twelve months of the term,

(*f*) Galsworthy *v.* Strutt (1848), 1 Ex. 659; 17 L. J. Ex. 226.
(*g*) (1849), 7 C. B. 716; 18 L. J. C. P. 217.
(*h*) (1893), 68 L. T. 857; 5 R. 374.
(*i*) [1896] 1 Q. B. 626; 65 L. J. Q. B. 474.

but to consume the same upon the premises, and provided that an additional rent of £3 per ton should be payable by way of penalty for every ton of hay or straw so sold. It appeared that there was a substantial difference between the manurial value of hay and that of straw. It was accordingly held that the sum so made payable was a penalty and not liquidated damages.

Election on breach.

It is to be observed that when a covenant is secured by a penalty, the obligee on breach has an election. Either he may go for the penalty and be satisfied with that, or he may sue on the covenant and recover more or less according to his merits. In the former case, the contract is rescinded, and the penalty becomes the debt in law (*k*).

Equitable relief.

Protector Loan Co. *v.* Grice.

On the subject of equitable relief against penalties, the reader is referred to Peachy *v.* Somerset (*l*), Sloman *v.* Walter (*m*), and Protector Loan Co. *v.* Grice (*n*). In the last-mentioned case it appeared that the plaintiffs had lent money to a man named Simpson, on his bond, under which repayment was to be made by instalments, *the whole of the instalments to become payable at once if default was made in the payment of any one of them.* The defendant as surety executed the bond, and, default having been made in payment of one instalment, this action was brought for the entire balance of unpaid instalments. "The doctrine in equity," said Baggallay, L. J., "is stated by Lord Macclesfield, L. C., in Peachy *v.* Duke of Somerset: 'The true ground of relief against penalties is from the original intent of the case where the money is designed only *to secure money*, and the Court gives him all that he expected or desired;' but it has long been established that relief in equity is also given where the penalty is intended *to secure the performance of a collateral object:* Sloman *v.* Walter. Familiar instances of the relief afforded in equity may be found in those cases where a default has occurred in repayment of a loan secured by a mortgage; *but where the intent is not simply to secure a sum of money, or the enjoyment of a collateral object, equity does not relieve.* It may be assumed, from the relation of the parties, that they intended to carry out the terms of the agreement; it was competent to them to determine that the loan should be repayable in the manner mentioned; it was worth the while of the parties that the money should be borrowed upon the terms mentioned in the condition; and it

(*k*) Winter *v.* Trimmer (1762), 1 W. Bl. 395; Harrison *v.* Wright (1811), 13 East, 343; Holt, N. P. C. 46. n. (*a*). And see General Accident Assurance Corp. *v.* Noel, [1902] 1 K. B. 377; 71 L. J. K. B. 236.

(*l*) (1714), 1 Stra. 447.

(*m*) (1781), 1 Bro. C. C. 118.

(*n*) (1880), 5 Q. B. D. 592; 49 L. J. Q. B. 812.

would be an act of injustice to the lenders to give judgment for the defendant."

Other important cases.

Other cases on the subject-matter of this note, which may advantageously be referred to, are Thompson *v.* Hudson (1869), L. R. 4 H. L. 1; 38 L. J. Ch. 431; Reynolds *v.* Bridge (1856), 6 E. & B. 528; 26 L. J. Q. B. 12; Mercer *v.* Irving (1858), E. B. & E. 563; 27 L. J. Q. B. 291; Howard *v.* Woodward (1864), 34 L. J. Ch. 47; 11 L. T. 414; Birch *v.* Stephenson (1811), 3 Taunt. 469; Farrant *v.* Olmius (1820), 3 B. & Al. 692; *Ex parte* Capper (1876), 4 Ch. D. 724; 46 L. J. Bk. 6, 57; Atkyns *v.* Kinnier (1850), 4 Ex. 766; 19 L. J. Ex. 132; Magee *v.* Lavell (1874), L. R. 9 C. P. 107; 43 L. J. C. P. 131; Lea *v.* Whitaker (1872), L. R. 8 C. P. 70; 27 L. T. 676; Sterne *v.* Beck (1863), 32 L. J. Ch. 682; 1 De G. J. & S. 595; Mexborough *v.* Wood (1882), 47 L. T. 516; and last, but not least, the very important case of Wallis *v.* Smith (1882), 21 Ch. D. 243; where the judgments should be carefully perused.

TORTS.

Injuria and Damnum.

ASHBY *v.* WHITE. (1703) [103]

[Lord Raym. 938.]

The vote of an elector at Aylesbury was rejected at the poll. As it happened, the candidates for whom the gentleman had intended to vote were elected. But in spite of his thus having sustained no actual damage, he brought an action against the returning officer, and, after much discussion, it was held that such an action could be maintained. In the course of his celebrated judgment, Holt, C. J., said, "A damage is not merely pecuniary, but an injury imports a damage, when a man is thereby hindered of his right. As in an action for slanderous words, though a man does not lose a penny by reason of the speaking them, yet he shall have an action. So if a man gives another a cuff on the ear, though it cost him nothing—no, not so much as a little *diachylon*—yet he shall have his action, for it is a personal injury. So a man shall have an action against another for riding over his ground, though it do him no damage; for it is an invasion of his property, and the other has no right to come there."

CHASEMORE *v.* RICHARDS. (1859) [104]

[7 H. L. C. 349; 29 L. J. Ex. 81.]

The local board of health for the town of Croydon in 1851 sank a well and supplied the people of Croydon with water at the rate of 600,000 gallons a day. But the

public gain was Mr. Chasemore's loss. That gentleman was the occupier of a mill situated on the river Wandle about a mile from Croydon, and had—he and his predecessors—used the river for the last seventy years for turning his wheels. The effect of what the local board had done was to prevent an enormous quantity of water from ever reaching the Wandle or his mill. He went to law, but did not win. The judges told him that, though he was much to be sympathised with, he had no legal remedy. There was *damnum*, they said, but not *injuria* (*a*).

Injuria and damnum.

These two cases pretty clearly illustrate the distinction between *injuria sine damno* and *damnum sine injuriâ*. Wherever a person has sustained what the law calls an "injury," *i.e.*, *where any right existing in the party damnified has been infringed upon*, there he may bring an action without being under the necessity of proving special damage, because the injury itself is taken to imply damage. A banker once dishonoured the cheque of a customer who really had plenty of money in the bank, and the customer therefore brought an action against him. It was held that the action was maintainable, although the plaintiff had not sustained any loss whatever by the banker's wrongful act. There was no *damnum*, true; but there was *injuria*, and that was sufficient (*b*). So an action lies against a man who trespasses in my field, although he does me no pecuniary injury (*c*).

De minimis non curat lex.

In Ashby *v.* White the defendant's counsel cited unsuccessfully the maxim *de minimis non curat lex*, contending that, even if Ashby had sustained some damage, it was of so inconsiderable a character as to be unworthy of notice.

Novelty no objection.

It was also objected that there was *no precedent* for such an action; but Lord Holt replied that *if men will multiply injuries, actions must be multiplied too* (*d*). "Where cases are new *in their principle* . . . it is necessary to have recourse to legislative interposition in order to remedy the grievance; but when the case is only new *in the instance*, and the only question is upon the application of a

(*a*) This case was discussed in the important case of Bradford Corporation *v.* Pickles, [1895] A. C. 587; 64 L. J. Ch. 759.

(*b*) Marzetti *v.* Williams (1830), 1 B. & Ad. 415; 9 L. J. K. B. 42.

(*c*) See Sears *v.* Lyons (1818), 2 Stark. 317; 20 R. R. 688; Nicklin *v.* Williams (1854), 10 Ex. 259; 23 L. J. Ex. 335.

(*d*) See, too, the Statute of Westminster II. (13 Edw. 1, c. 24), which affirmed the common law, and gave rise to *actions on the case*.

principle recognised in the law to such new case, it will be just as competent to courts of justice to apply the principle to any case which may arise two centuries hence as it was two centuries ago. If it were not so, we ought to blot out of our law books one-fourth part of the cases that are to be found in them" (*e*).

Damnum sine injuriâ.

On the other hand, it is not everything that the law regards as an injury. Great loss may be inflicted by one man on another without legal redress being obtainable. If you are driving a flourishing trade as a schoolmaster, and I come and set up a school just opposite to yours, and the boys desert you and flock to me, there is no *injuria* here, though I may have turned schoolmaster for the express purpose of ruining you. It is *damnum sine injuriâ*, and you have no right of action against me. So, too, slander and seduction are not always actionable. See also Metr. Asylums District Board *v.* Hill (1881), 6 App. Cas. 193; 50 L. J. Q. B 353.

Whether, under any circumstances, an action at law lies against a clergyman for refusing without just cause to perform the marriage ceremony is doubtful (*f*).

Rights of riparian ownership.

Chasemore *v.* Richards is a case of considerable importance on the subject of watercourses. Every riparian owner is entitled to take a reasonable quantity of the water flowing in a natural stream, whether tidal and navigable or not (*g*), for his domestic requirements, the reasonableness depending on the circumstances of each case (*h*). When no material injury would thereby be inflicted on lower riparian owners, he may even divert or dam (*i*); but, of course, when he dams, he must not let the water all go with a rush so as to flood his neighbour's lands (*k*). And as the riparian owner has no business to take *too much* water, so neither can he *pollute* the stream; and, if he does so, it will be no excuse that others have been more foul than he has, so that his particular pollution is

Diverting and damming.

(*e*) Per Ashhurst, J., in Pasley *v.* Freeman (1789), 3 T. R. 63; 1 R. R. 634, *post*, p. 535.

(*f*) See the judgments in Davis *v.* Black (1841), 1 Q. B. 900; 10 L. J. Q. B. 338.

(*g*) Lyon *v.* Fishmongers' Co. (1876), 1 App. Cas. 662; 46 L. J. Ch. 68. See also the recent case of North Shore Railway *v.* Pion (1889), 14 App. Cas. 612; 59 L. J. P. C. 25.

(*h*) Sandwich *v.* G. N. Ry. Co. (1878), 10 Ch. D. 707; 27 W. R. 616.

(*i*) Nuttall *v.* Braceweell (1866), L. R. 2 Ex. 1; 36 L. J. Ex. 1; Swindon Waterworks Co. *v.* Wilts Canal Co. (1875), L. R. 7 H. L. 697; 45 L. J. Ch. 638; and see Ormerod *v.* Todmorden (1883), 11 Q. B. D. 155; 52 L. J. Q. B. 445; Kensit *v.* G. E. Ry. Co. (1884), 27 Ch. D. 122; 54 L. J. Ch. 19. But see Roberts *v.* Gwyrfai Rural Council, [1899] 2 Ch. 608; 68 L. J. Ch. 757.

(*k*) See Buckley *v.* Buckley, [1898] 2 Q. B. 608; 67 L. J. Q. B. 953.

imperceptible (*l*). By grant or prescription, however, a riparian owner may be entitled to divert or pollute a stream (*m*).

A prescriptive right, however, to divert or pollute a stream in a particular way or at a particular place infers no right to divert or pollute in any other way or at any other place (*n*).

Purity and flow.

In addition to the riparian owner's rights to take water *for use*, and to have it *pure*, he has a right to the stream's *natural flow* (*o*);

Underground streams.

and this is so even in the case of a stream *flowing underground* in a definite channel or tunnel (*p*), provided such channel is known, or can, at any rate, be easily and inevitably inferred without recourse to exploratory excavations (*q*). "If the channel or course underground is known, as in the case of the river Mole, it cannot be interfered with. It is otherwise when nothing is known as to the sources of supply; in that case, as no right can be acquired against the owner of the land under which the spring exists, he may do as he pleases with it" (*r*). But the owner of a source of a spring may not destroy the natural flow from the spring into the course of the stream fed by the spring (*s*); and this rule is not affected by the circumstance that at some remote date the issuing point of the spring has been built over, and an artificial channel formed for the passage of the water (*t*).

Artificial streams.

The right to use an artificial stream depends on the circumstances of its creation; but it has been held that the flow of water from a drain made for agricultural improvements for twenty years does not give a right to the person through whose land it flowed to the continuance of the flow, so as to preclude the proprietor of the land drained from altering the level of his drains for the improvement of his land, and so cutting off the supply (*u*). But if an artificial stream is *permanent in its character*, a right to the uninterrupted

(*l*) Wood *v.* Waud (1849), 3 Ex. 748; 18 L. J. Ex. 305; and see Ballard *v.* Tomlinson (1885), 29 Ch. D. 115; 54 L. J. Ch. 454; Snow *v.* Whitehead (1884), 27 Ch. D. 588; 53 L. J. Ch. 885.

(*m*) Embrey *v.* Owen (1851), 6 Ex. 353; 20 L. J. Ex. 212.

(*n*) See M'Intyre *v.* M'Gavin, [1893] A. C. 268; 57 J. P. 548.

(*o*) See Young *v.* Bankier Distillery Co., [1893] A. C. 691; 69 L. T. 838.

(*p*) Holker *v.* Porritt (1875), L. R. 10 Ex. 59; 44 L. J. Ex. 52. But see Ballard *v.* Tomlinson, *supra*.

(*q*) Bradford Corp. *v.* Ferrand (No. 2), [1902] 2 Ch. 655; 71 L. J. Ch. 859.

(*r*) Per Pollock, C. B., in Dudden *v.* The Guardians of Clutton Union (1857), 1 H. & N. 627; 26 L. J. Ex. 146. See Bunting *v.* Hicks (1894), 70 L. T. 455; 7 R. 293.

(*s*) Dudden *v.* Clutton Union, *supra*.

(*t*) Mostyn *v.* Atherton, [1899] 2 Ch. 360; 68 L. J. Ch. 629.

(*u*) Greatrex *v.* Hayward (1853), 8 Ex. 291; 22 L. J. Ex. 137; and see Brymbo Water Co. *v.* Lesters Lime Co., (1894) 8 R. 329.

flow of the water may be acquired (*x*); and in Sutcliffe *v.* Booth (*y*) it was held that a watercourse, though artificial, may have been originally made under such circumstances, and have been so used, as to give all the rights that the riparian proprietors would have had if it had been a natural stream. The most recent case on this subject is Baily *v.* Clark (*z*) in the Court of Appeal. It was there laid down by Stirling, L. J., that in ascertaining the rights of persons in an artificial watercourse the Court must take into account—first, the character of the watercourse, whether it is of a temporary or permanent character; secondly, the circumstances under which it was created; and thirdly, the mode in which it has been actually used and enjoyed.

Percolating water. McNab *v.* Robertson.

There is no natural right to the uninterrupted flow of percolating water whose course is undefined and unknown (*a*). But such rights may be granted by one landowner to another (*b*). Reference may be made on this point to the judgments of the House of Lords in the recent case of McNab *v.* Robertson (*c*), where it was held that water percolating through the ground in no defined or visible channel is not a "stream." Lord Halsbury, however, in a dissenting judgment, held that though the word "stream" in its more usual application does imply water running between defined banks, it is not confined to that meaning—its essence being that it is water in motion as distinguished from stagnant water.

Land supported by water.

Where the defendant, by draining his land, drained away subterranean water from under the plaintiff's land, and thereby caused it to sink, it was held that no action could be brought (*d*).

Water supported by water.

But the defendant would be liable if, in drawing off subterranean water, he were to draw off water flowing in a defined surface channel (*e*).

Other important cases.

The following cases on watercourses may also be usefully referred to:—Bealey *v.* Shaw (1805), 6 East, 208; 2 Smith, 321; Saunders *v.* Newman (1818), 1 B. & Al. 258; 19 R. R. 312; Wright *v.* Howard (1823), 1 Sim. & Stuart, 190; 1 L. J. Ch. 94; Mason *v.*

(*x*) See Arkwright *v.* Gell (1839), 5 M. & W. 203; 2 H. & H. 17.

(*y*) (1863), 32 L. J. Q. B. 136; 9 Jur. N. S. 1037; and see Roberts *v.* Richards (1881), 50 L. J. Ch. 297; 44 L. T. 271.

(*z*) [1902] 1 Ch. 649; 71 L. J. Ch. 396. See also the judgment of Farwell, J., in Burrows *v.* Lang, [1901] 2 Ch. 502; 70 L. J. Ch. 607.

(*a*) Acton *v.* Blundell (1843), 12 M. & W. 324; 13 L. J. Ex. 289; and see Bradford Corporation *v.* Pickles, [1895] A. C. 587; 64 L. J. Ch. 759.

(*b*) Whitehead *v.* Parks (1858), 2 H. & N. 870; 27 L. J. Ex. 169.

(*c*) [1897] A. C. 129; 66 L. J. P. C. 27.

(*d*) Popplewell *v.* Hodkinson (1869), L. R. 4 Ex. 248; 38 L. J. Ex. 126.

(*e*) Grand Junction Canal Co. *v.* Shugar (1871), L. R. 6 Ch. 483; 24 L. T. 402.

Hill (1832), 3 B. & Ad. 304; 2 N. & M. 747; 5 B. & Ad. 1; Hodgkinson *v.* Ennor (1863), 4 B. & S. 229; 32 L. J. Q. B. 231; Magor *v.* Chadwick (1840), 11 A. & E. 571; 3 P. & D. 367; Whalley *v.* L. & Y. Ry. Co. (1884), 13 Q. B. D. 131; 53 L. J. Q. B. 285; Blair *v.* Deakin (1887), 57 L. T. 522; 52 J. P. 327; and Clarke *v.* Somersetshire Drainage Commissioners (1888), 57 L. J. M. C. 96; 59 L. T. 670.

Death of tortfeasor.

An action for a tort cannot generally be brought after his death against the representatives of the person who has committed it, because *actio personalis moritur cum persona* (*f*). But see 3 & 4 Will. 4, c. 42, and 9 & 10 Vict. c. 93 (*g*).

Ancient Lights.

[105] YATES *v.* JACK. (1866)

[L. R. 1 Ch. 295; 14 L. T. 151.]

The plaintiff was a merchant carrying on business at a warehouse in London, and he asked for an injunction restraining his opposite neighbour from erecting a building so as to obstruct his ancient lights. For the defendant it was contended that no injury would be done to the plaintiff by the new buildings, for he would still have plenty of light for his business. But it was held that, even if that were so, it did not matter; because the owner of ancient lights is entitled *not only to sufficient light for the purpose of his then business, but to all the light which he had enjoyed previously as to the interruption sought to be restrained.* "The

(*f*) See Kirk *v.* Todd (1882), 21 Ch. D. 484; 52 L. J. Ch. 224; Bowker *v.* Evans (1885), 15 Q. B. D. 565; 54 L. J. Q. B. 421.

(*g*) And see Jenks *v.* Clifden, [1897] 1 Ch. 694; 66 L. J. Ch. 338; following Woodhouse *v.* Walker (1880), 5 Q. B. D. 404; 49 L. J. Q. B. 609; and *In re* Duncan, Terry *v.* Sweeting, [1899] 1 Ch. 387; 68 L. J. Ch. 253.

right conferred or recognized by the statute 2 & 3 Will. 4, c. 71," said Lord Cranworth, L. C., "is an absolute indefeasible right to the enjoyment of the light, *without reference to the purpose for which it has been used.*"

Section 3.

The third section of the Prescription Act (*h*) says that "When the access and use of light to and for any dwelling-house, workshop, or other building shall have been actually enjoyed (*i*) therewith for the full period of twenty years without interruption, the right thereto shall be deemed absolute and indefeasible," unless the same was enjoyed merely by written consent. This section has been held not to bind the Crown, and, consequently, no right of light can be obtained under the section over land in possession of the Crown, whether held directly or through trustees (*k*). But a right to light may be acquired by enjoyment for the statutory period against a statutory company or other servient owner incapable of granting it, inasmuch as such right depends upon positive enactment, and does not require any presumption of grant (*l*).

Common law prescription.

An indefeasible right, however, to the access and use of light may be gained by prescription at common law, independently of the Act (*m*).

"Without interruption."

Section 4 of the Prescription Act points out the way in which the enjoyment may be effectively interrupted. Nothing is to be deemed an interruption unless it has been *submitted to for a year* after notice (*n*). Flight *v.* Thomas (*o*) is a leading case on the construction of this section. It was held in that case that an enjoyment for 19 years and 330 days, followed by an interruption of 35 days just before the commencement of the action, was sufficient to establish the right. But it has been held, that notwithstanding this section, the Court will not interfere by injunction to protect the inchoate right to an easement of light, although the light may

(*h*) 2 & 3 Will. 4, c. 71.

(*i*) Cooper *v.* Straker (1888), 40 Ch. D. 21; 58 L. J. Ch. 26; approved in Smith *v.* Baxter, [1900] 2 Ch. 138; 69 L. J. Ch. 437.

(*k*) Perry *v.* Eames, [1891] 1 Ch. 658; 60 L. J. Ch. 345; Wheaton *v.* Maple, [1893] 3 Ch. 48; 62 L. J. Ch. 963.

(*l*) See Tapling *v.* Jones (1865), 34 L. J. C. P. 312; 11 H. L. C. 290; and Jordeson *v.* Sutton, &c. Gas Co., [1898] 2 Ch. 614; 67 L. J. Ch. 666.

(*m*) Aynsley *v.* Glover (1875), L. R. 10 Ch. 283; 44 L. J. Ch. 523; Kelk *v.* Pearson (1871), L. R. 6 Ch. 809; 24 L. T. 890; Norfolk *v.* Arbuthnot (1880), 5 C. P. D. 390; 49 L. J. C. P. 782.

(*n*) See Seddon *v.* Bank of Bolton (1882), 51 L. J. Ch. 542. As to what is a sufficient interruption, see Presland *v.* Bingham (1889), 41 Ch. D. 268; 60 L. T. 433.

(*o*) (1840), 11 A. & E. 688; 8 C. & P. 231; and see Glover *v.* Coleman (1874), L. R. 10 C. P. 108; 44 L. J. C. P. 66.

have actually been enjoyed without interruption for more than 19 years next before action brought (*p*).

Open spaces.

A right to unobstructed light cannot be acquired in favour of *open ground*, but only in favour of *buildings* (*q*). But the building need not be occupied or even completed internally so as to be fit for immediate habitation (*r*).

Extent of light.

There is no standard of the light ordinarily required by a house for the purposes of habitation or business, and if there is an obstruction of the light of a house which causes *substantial diminution* of the light such as to cause substantial damage to the owner or tenant, that is an interference which entitles the persons injured to relief, although after the obstruction the house may be no worse lighted than the majority of the houses in the neighbourhood, or may have what is, in the opinion of the judge, abundant light for all ordinary purposes of inhabitancy or business (*s*).

Different application of premises to be contemplated.

The leading case was followed in Moore *v.* Hall (*t*), where Mellor, J., said, "I do not think the present actual condition of the premises is the measure of the amount of damage. In estimating the damages, you ought not, in my opinion, to stereotype the existing condition of the premises, but to *calculate the reasonable probabilities of a different application of them*." The dim religious light which is good enough for the smoking room will not do for the library; and there is no reason why I should not give up the fragrant weed and convert my smoking room into a library (*u*).

A person who has acquired a prescriptive right to the access of light to his ancient windows, but who has only used such light for an extraordinary or special purpose for a period less than 20 years, is nevertheless entitled to an injunction to prevent any serious interference with the access of light as enjoyed for such special purpose (*x*).

(*p*) Battersea *v.* Commissioners of Sewers, [1895] 2 Ch. 708; 65 L. J. Ch. 81; following Bridewell Hospital *v.* Ward (1893), 62 L. J. Ch. 270; 68 L. T. 212.

(*q*) Potts *v.* Smith (1868), L. R. 6 Eq. 311; 38 L. J. Ch. 58; Roberts *v.* Macord (1832), 1 M. & Rob. 230; 42 R. R. 784; Harris *v.* De Pinna (1886), 33 Ch. D. 238; 56 L. J. Ch. 344; Clifford *v.* Holt, [1899] 1 Ch. 698; 68 L. J. Ch. 332 (where a *greenhouse* was held to be a "building"); and Easton *v.* Isted, [1903] 1 Ch. 405; 72 L. J. Ch. 189.

(*r*) Courtauld *v.* Legh (1869), L. R. 4 Ex. 126; 38 L. J. Ex. 45; Collis *v.* Laugher, [1894] 3 Ch. 659; 63 L. J. Ch. 851.

(*s*) Warren *v.* Brown, [1902] 1 K. B. 15; 71 L. J. K. B. 12: and see Parker *v.* Stanley (1902), 50 W. R. 282.

(*t*) (1878), 3 Q. B. D. 178; 47 L. J. Q. B. 334; expressly overruling Martin *v.* Goble (1808), 1 Camp. 320.

(*u*) See Aynsley *v.* Glover, *supra*.

(*x*) Lazarus *v.* Artistic Photographic Co., [1897] 2 Ch. 214; 66 L. J. Ch. 522; not following Lanfranchi *v.* Mackenzie (1867), L. R. 4 Eq. 421; 36 L. J. Ch. 518. See also Warren *v.* Brown, *supra*.

There can be no enlargement of right to light.

If a person opens new lights, or enlarges old ones, these new lights or enlargements may be obstructed with impunity; but the original lights are still entitled to protection (*y*). The case of Fowlers *v.* Walker (*z*) should be referred to on this branch of the subject. In 1868 three cottages at Liverpool containing ancient lights were pulled down, and a large warehouse was built on their site containing three large windows. There was no satisfactory evidence as to the position of the windows in the cottages, though it was admitted that *small parts of the new windows might occupy portions of space through which light was admitted to the cottages.* In an action against some people who proposed to darken, it was held that, in the absence of evidence as to the position of the ancient lights, the easement could not be maintained as to the new building. "It is a novel case," said James, L. J., "upon this point, that it is not the case of enlarged windows, but of old cottages converted into a magnificent block of warehouses. The whole structure has been altered, and the only suggestion made is that in this palatial store, which has superseded the humble cottages, there are some portions of the existing windows which coincide with some portions of the old windows. . . . Where there has been such a change, it is incumbent on the plaintiffs to give satisfactory evidence that there is so much of the old aperture of the window existing that the Court can see that the diminution of light creates substantial interference with the plaintiff's right" (*a*).

Abandonment of right.

The right to ancient lights is abandoned by pulling down the building, or blocking up the lights, with the intention of abandoning (*b*). The question of intention is one of fact, depending on the circumstances of each case.

(*y*) See National Ins. Co. *v.* Prud. Ass. Co. (1877), 6 Ch. D. 757; 46 L. J. Ch. 871; Barnes *v.* Loach (1879), 4 Q. B. D. 494; 48 L. J. Q. B. 756; Eccl. Comm. *v.* Kino (1882), 14 Ch. D. 213; 49 L. J. Ch. 529.

(*z*) (1882), 51 L. J. Ch. 443; 42 L. T. 356; and see Scott *v.* Pape (1886), 31 Ch. D. 554; 55 L. J. Ch. 426, where it was held that an easement of ancient lights will not necessarily be treated as abandoned because the old building has been pulled down and another substituted. See also Bullers *v.* Dickinson (1885), 29 Ch. D. 155; 54 L. J. Ch. 776; Harris *v.* De Pinna (1886), 33 Ch. D. 238; 56 L. J. Ch. 344; Greenwood *v.* Hornsey (1886), 33 Ch. D. 471; 55 L. J. Ch. 917 (in which Holland *v.* Worley (1884), 26 Ch. D. 578; 54 L. J. Ch. 268, was not followed); Martin *v.* Price, [1894] 1 Ch. 276; 63 L. J. Ch. 209.

(*a*) And see Pendarves *v.* Monro, [1892] 1 Ch. 611; 61 L. J. Ch. 494.

(*b*) Moore *v.* Rawson (1824), 3 B. & C. 332; 5 D. & R. 234; Stokoe *v.* Singers (1857), 8 E. & B. 31; 26 L. J. Q. B. 257; Smith *v.* Baxter, [1900] 2 Ch. 138; 69 L. J. Ch. 437.

Suspension.

The acquiring of a right to light under the statute is *suspended* during the continuance of a *unity of possession* of the dominant and servient tenements (*c*).

Must not derogate from grant.

A man cannot derogate from his own grant.

"There can be no doubt that the law as laid down by Palmer *v.* Fletcher (*d*) is the law of the present day; that is, that *where a man grants a house in which there are windows, neither he nor anybody claiming under him can stop up the windows or destroy the lights.* That is based on the principle that a man shall not derogate from his own grant; and it makes no difference whether he grants the house *simply as a house*, or whether he grants the house *with the windows or the lights* thereto belonging. In both cases he grants with the apparent easements or *quasi* easements. All that is now, I take it, settled law.

"I take it also that it is equally settled law that *if a man who has a house and land grants the land first, reserving the house, the purchaser of the land can block up the windows of the house.*

"Then there comes a third case. Supposing the owner of the land and the house sells the house and the land at the same moment, and supposing he expressly sells the house with the lights, can it be said that the purchaser of the land is entitled to block up the lights, the vendor being the same in each case, and both purchasers being aware of the simultaneous conveyances? Certainly not" (*e*).

Birmingham Banking Co. *v.* Ross.

The maxim that a grantor shall not derogate from his grant received an important limitation in the case of Birmingham Banking Co. *v.* Ross (*f*), where it was held that a grantee of a house was not entitled to claim an easement of light to an extent inconsistent with the intention to be implied from the circumstances existing at the time of the grant and known to the grantee (*g*).

(*c*) Ladyman *v.* Grave (1871), L. R. 6 Ch. 763; 25 L. T. 52.

(*d*) (1675), 1 Sid. 167, 227. The principle of this case is applicable not only to conveyances for valuable consideration, but also to devises and voluntary conveyances: see Phillips *v.* Low, [1892] 1 Ch. 47; 61 L. J. Ch. 44.

(*e*) Per Jessel, M. R., in Allen *v.* Taylor (1880), 16 Ch. D. 355; 50 L. J. Ch. 178; and see Swansborough *v.* Coventry (1832), 9 Bing. 305; 2 M. & S. 362; Compton *v.* Richards (1814), 1 Price, 27; 15 R. R. 682; Wheeldon *v.* Burrows (1879), 12 Ch. D. 31; 48 L. J. Ch. 853; Russell *v.* Watts (1885), 10 App. Cas. 590; 55 L. J. Ch. 158; Robson *v.* Edwards, [1893] 2 Ch. 146; 62 L. J. Ch. 378.

(*f*) (1888), 38 Ch. D. 295; 57 L. J. Ch. 601.

(*g*) See also Myers *v.* Catterson (1889), 43 Ch. D. 470; 62 L. T. 205; Wilson *v.* Queen's Club, [1891] 3 Ch. 522; 60 L. J. Ch. 698; Corbett *v.* Jonas, [1892] 3 Ch. 137; 62 L. J. Ch. 43; and Godwin *v.* Schweppe's, Limited, [1902] 1 Ch. 926; 71 L. J. Ch. 438. An instructive article on

It should, however, be observed that, as the grantee of a house has a *primâ facie* right to light as against his grantor, the burden of showing that that right is limited or restricted lies on the grantor. And it has recently been held (*h*), that in a conveyance of a house the description of adjoining land belonging to the grantor as "building land" does not show a "contrary intention" within sect. 6, sub-sect. 4, of the Conveyancing Act, 1881 (*i*), so as to exclude the grantee's right to light under sub-sect. 2 of that Act.

Angle of forty-five degrees.

There is no rule of law that a man may always build up to an angle of forty-five degrees; but in judging of the probable effect of a proposed building the Court may not unreasonably regard the fact that an angle of forty-five degrees will be left as *primâ facie* evidence that there will be no substantial interference, and may require this presumption to be clearly rebutted by satisfactory evidence (*k*).

Air.

Webb *v.* Bird.

Though the two subjects are often incorrectly treated as if they rested on the same principles, *a right to air is quite distinct from a right to light.* In Webb *v.* Bird (*l*), it was held that the owner of a windmill could not, under sect. 2 of the Prescription Act, prevent the owner of adjoining land from building so as to interrupt the passage of air to the mill, although it had been worked by this air for more than twenty years. "That which is claimed here," said Willes, J., in the Court below (*m*), "amounts to neither more nor less than this—that a person having a piece of ground and building a windmill upon it, acquires by twenty years' enjoyment a right to prevent the proprietors of all the surrounding land from building upon it, if by so doing the free access of wind from any quarter should be impeded or obstructed. It is impossible to see how the adjoining owners could prevent the acquisition of such a right, except by *combining together to build a circular wall round the mill* within twenty years. It would be absurd to hold that men's rights are to be made dependent on anything so inconvenient and impracticable."

Bryant *v.* Lefever.

So, too, in the case of Bryant *v.* Lefever (*n*), it was held that the access of air to chimneys cannot, as against the occupier of neigh-

"Quasi Grant of Easements," in the "Law Quarterly Review" (1894), page 323, may be referred to on this subject.

(*h*) Broomfield *v.* Williams, [1897] 1 Ch. 602; 66 L. J. Ch. 305; and see Quicke *v.* Chapman, [1903] 1 Ch. 659; 72 L. J. Ch. 373; and Pollard *v.* Gare, [1901] 1 Ch. 834; 70 L. J. Ch. 401.

(*i*) 44 & 45 Vict. c. 41.

(*k*) Home and Colonial Stores *v.* Colls, [1902] 1 Ch. 302; 71 L. J. Ch. 146.

(*l*) (1863), 13 C. B. N. S. 841; 31 L. J. C. P. 335.

(*m*) (1862), 10 C. B. N. S. 268.

(*n*) (1879), 4 C. P. D. 172; 48 L. J. Ch. 380; and see Harris *v.* De Pinna, *supra.*

bouring land, be claimed either as a natural right of property, or as an easement by prescription from the time of legal memory, or by a lost grant, or under the Prescription Act.

Bass *v.* Gregory.

In Bass *v.* Gregory (*o*), the right to a passage of air through a defined channel was allowed. There, the cellar of the plaintiff's public-house was ventilated by means of a shaft cut therefrom through the rock into a disused well, situated in an adjoining yard, owned and occupied by the defendant, the air from the cellar passing through the shaft and out at the top of the well. The cellar had been so ventilated for forty years at least, without interruption, and with the knowledge of the occupier of the yard. Baron Pollock held that the plaintiffs could legally claim, as against the defendant, the easement of the free passage of air from the cellar, and that a lost grant of the right ought to be inferred.

An action may lie in a case where there has been a diminution or alteration in the quantity or quality of air so considerable as to cause a nuisance or be prejudicial to health (*p*).

Chastey *v.* Ackland.

Reference, however, should be made to the judgments in the case of Chastey *v.* Ackland (*q*), where it was held that no right to the undefined passage of air can be acquired either under the Prescription Act, or by prescription at common law, or by presumption of a lost grant. Therefore, where a defendant by building on his own land intercepted the current of air which blew laterally from the defendant's premises past the plaintiffs' premises, which were more than twenty years old, and thereby caused the air in the plaintiffs' yard to become more stagnant, the Court held that the plaintiffs were not entitled to an injunction to compel the defendant to pull down his building. It was a case of *damnum absque injuriâ*.

Interruption of view.

It is scarcely necessary to say that there is no right of action against a builder who comes and spoils a *landscape* (*r*).

Action against

Where an actionable obstruction to ancient lights is continued by

(*o*) (1890), 25 Q. B. D. 481; 59 L. J. Q. B. 574.

(*p*) City of London Brewery Co. *v.* Tennant (1873), L. R. 9 Ch. 212; 43 L. J. Ch. 457; Hall *v.* Lichfield Brewery Co. (1880), 49 L. J. Ch. 655.

(*q*) [1895] 2 Ch. 389; 64 L. J. Q. B. 523. It should, however, be observed that the plaintiffs appealed to the House of Lords against this decision, and, during the argument, several of their Lordships expressed assent from the reasoning and the decision of the Court of Appeal. Halsbury, L. C., observed that their Lordships might possibly grant a mandatory injunction. The parties thereupon came to terms favourable to the plaintiffs, and leave to withdraw the appeal was granted. [1897] A. C. 155; 66 L. J. Q. B. 518. See also an article by H. B. Edge (who was of counsel in this case) in the L. T. Newspaper of March 13th, 1897.

(*r*) Aldred's case (1611), 9 Coke's Rep. 58, a.

the obstructor down to his death, an action for damages lies against his executors or administrators under section 2 of the Civil Procedure Act, 1833 (*s*), though the obstruction was completed more than six months before his death (*t*). executors of obstructor.

Sic utere tuo ut alienum non lædas.

FLETCHER *v.* RYLANDS. (1868) [106]

[L. R. 1 Ex. 265; L. R. 3 H. L. 330.]

Some mill-owners made a reservoir, employing a competent engineer and first-class workmen. During the construction of it, the workmen came upon some old vertical mine shafts, of the existence of which no one was previously aware. These they carefully filled up with soil. But, when the water came to be put into the reservoir, it ran through, and did mischief to the neighbouring mines of Mr. Fletcher, who instituted legal proceedings. The mill-owners defended the action, thinking that as they had employed competent persons to construct the reservoir, they would not be held responsible. But they were mistaken. On the ground that *a person who for his own purposes brings on his lands and collects and keeps there anything likely to do mischief if it escapes, must keep it in at his peril, and, if he does not do so, is* primâ facie *answerable for all the damage which is the natural consequence of its escape*, negligence or not being quite immaterial, they were compelled to compensate Mr. Fletcher for the damage the water had inflicted on his mines.

(*s*) 3 & 4 Will. 4, c. 42.

(*t*) Jenks *v.* Clifden, [1897] 1 Ch. 691; 66 L. J. Ch. 338; following Woodhouse *v.* Walker (1880), 5 Q. B. D. 404; 49 L. J. Q. B. 609.

[107] **NICHOLS *v.* MARSLAND.** (1876)

[2 Ex. D. 1; 46 L. J. Ex. 174.]

Mrs. Marsland was the proprietor of some ornamental lakes in the county of Chester. She had not made them herself. They had existed time out of mind, and had always borne the character of being substantially-constructed lakes. But on the 18th of June, 1872, there came a tremendous storm, the like of which the oldest inhabitant could not remember. The rains descended, the floods came, and Mrs. Marsland's lakes burst their fetters, and swept away two or three county bridges. Nichols was the county surveyor of Cheshire, and brought this action for the damage done. It was argued for the surveyor, with much plausibility, that Mrs. Marsland was in the same position as a person who keeps a mischievous animal with knowledge of its propensities, and therefore that inquiry as to whether she had been negligent or not was needless,—she kept the lakes at her peril. It was held, however, that as the lakes had been carefully constructed and maintained, and the downpour of rain was so extraordinary as to amount to *vis major*, the defendant was not responsible.

Sic utere tuo.

"*A man must keep his own filth on his own ground*," says an old case in Salkeld (*u*), and the principle is the foundation of Fletcher *v.* Rylands. By all means do what you will with your own, but *sic utere tuo ut alienum non lædas*. For this reason, when a man brings on to his land anything that will do damage to his neighbour if it escapes, he keeps it at his peril (*x*).

(*u*) Tenant *v.* Goldwin (1705), 1 Salk. 360; 2 Ld. Raym. 1089.

(*x*) See National Telephone Co. *v.* Baker, [1893] 2 Ch. 186; 62 L. J. Ch. 699, where it was held that the creation and discharge of an electrical current beyond the control of the person creating it renders him liable for the damage the current may cause; and see Meux's Brewery Co. *v.* City of London Electric Lighting Co., [1895] 1 Ch. 287; 64 L. J. Ch. 216. But this principle cannot be so extended as

Ballard *v.* Tomlinson.

Ballard *v.* Tomlinson (*y*) was decided on this ground. The plaintiff and defendant were adjoining landowners, and each had a deep well on his own land, the plaintiff's land being at a lower level than the defendant's. The defendant turned sewage from his house into his well, and so polluted the water that percolated underground from the defendant's to the plaintiff's land, and consequently the water which came into the plaintiff's well from such percolating water when he used his well by pumping, came adulterated with the sewage from the defendant's well. It was held that the plaintiff had a right of action against the defendant for so polluting the source of supply, although, until the plaintiff had appropriated it, he had no property in the percolating water under his land, and although he appropriated such water by the artificial means of pumping.

Escaping gas.

Batcheller *v.* Tunbridge Wells Gas Co. (*z*) was an action to restrain a gas company from polluting a water supply with gas escaping from their pipes, and it was held that the defendants were liable.

The mound.

In Hurdman *v.* The North Eastern Railway Company (*a*), the defendants were held responsible for having on their own land built an artificial mound so close to the plaintiff's house as to render it damp and unhealthy by the rain oozing through.

The cow that swallowed the wire.

Firth *v.* The Bowling Iron Co. (*b*), where the plaintiff's cow had swallowed a bit of decayed wire, which had fallen from the defendants' fence, and been poisoned by it, is to the same effect; and so is

Yew trees.

Crowhurst *v.* The Amersham Burial Board (*c*), where the plaintiff's horse had been poisoned by eating of a yew tree which the defendants had planted so near their boundary that it projected into the adjoining meadow of the plaintiff (*d*). But in Wilson *v.* Newberry (*e*), it was

to impose liability when the injury done is in part the consequence of the neighbour's using his own property in a manner which creates a special susceptibility to the damage done. Eastern and South African Telegraph Co. *v.* Cape Town Tramways Co., [1902] A. C. 381; 71 L. J. P. C. 122.

(*y*) (1885), 29 Ch. Div. 115; 54 L. J. Ch. 454.

(*z*) (1902), 84 L. T. 765; 65 J. P. 680.

(*a*) (1878), 3 C. P. D. 168; 47 L. J. C. P. 368.

(*b*) (1878), 3 C. P. D. 254; 47 L. J. C. P. 358.

(*c*) (1878), 4 Ex. D. 5; 48 L. J. Ex. 109.

(*d*) Where branches of a tree growing upon land of one owner overhang that of another, the owner of the land encroached upon may, without notice to his neighbour, cut so much of the branches of the tree as overhang his land, provided that he can do so without going on his neighbour's land. Lemmon *v.* Webb, [1895] A. C. 1; 64 L. J. Ch. 205. *Quære*, whether the law is the same in the case of young trees or shrubs which may be transplanted, see *ib.* per Lord Macnaghten. The owner of a tree cannot acquire the right for it to overhang his neighbour's land either by prescription or the Statute of Limitations. *Ibid.*

(*e*) (1871), L. R. 7 Q. B. 31; 41 L. J. Q. B. 31.

held that a man is not liable to an action merely because by some unexplained means, the leaves from a yew tree growing on his land get on to his neighbour's land, and are there eaten by, and poison, his cattle. Nor is a man, having a yew tree upon his land, but being under no obligation to fence against his neighbour's cattle, liable for damages caused to such cattle by eating of the yew tree *when trespassing* on his land (*f*).

Thistles.

In the case of Giles *v.* Walker (*g*), an occupier of land neglected to cut thistles growing naturally on his land, with the result that the seeds were blown on to his neighbour's land and caused damage; and it was held that he was not liable, on the ground that he was under no duty towards his neighbour to cut down the thistles, as they were the natural growth of his land.

Tigers as pets.

It has long been a settled legal principle that a person who keeps a savage animal, such as a tiger or a lion, does so at his peril. If the animal escapes and hurts anyone, it is not necessary for the party injured to show that the owner knew the animal to be specially dangerous. In May *v.* Burdett (*h*), which was the case of a monkey biting a lady, Lord Denman, C. J., said, "Whoever keeps an animal accustomed to attack and bite mankind, with knowledge that it is so accustomed, is *primâ facie* liable in an action on the case at the suit of any person attacked and injured by the animal, without any averment of negligence or default in the securing or taking care of it. The gist of the action is the *keeping* the animal after knowledge of its mischievous propensities." So, too, it has been held that the owner of an elephant keeps it at his peril, and is liable for any injury it may cause (*i*).

The monkey case.

Elephant.

Dogs.

Proof of the *scienter*.

In the case of an action for a dog-bite, the plaintiff must prove what is called "the *scienter*," that is, that the defendant knew the dog to be specially dangerous to *mankind* (*k*). The knowledge of the servant having charge of the dog is the knowledge of the master (*l*); and a complaint to the owner's wife (*m*), or barmaid (*n*) on the premises, to be communicated to the owner, may be

(*f*) Ponting *v.* Noakes, [1894] 2 Q. B. 281; 63 L. J. Q. B. 549.

(*g*) (1890), 24 Q. B. D. 656; 59 L. J. Q. B. 416.

(*h*) (1846), 9 Q. B. 101; 16 L. J. Q. B. 64.

(*i*) Filburn *v.* People's Palace Co. (1890), 25 Q. B. D. 258; 59 L. J. Q. B. 471.

(*k*) See Osborne *v.* Chocqueel, [1896] 2 Q. B. 109; 65 L. J. Q. B. 534, where it was held that it is not sufficient for the plaintiff to show that the dog had to the defendant's knowledge previously attacked and bitten a goat.

(*l*) Baldwin *v.* Casella (1872), L. R. 7 Ex. 325; 41 L. J. Ex. 167.

(*m*) Gladman *v.* Johnson (1867), 36 L. J. C. P. 153; 15 L. T. 476.

(*n*) Applebee *v.* Percy (1874), L. R. 9 C. P. 647; 43 L. J. C. P. 365.

evidence of knowledge. It is not necessary to prove that the dog has actually bitten anyone before (*o*); but the plaintiff must go further than merely to show that it was usually kept tied up (*p*) on account of its supposed ferocity, and must prove that on former occasions it has shown symptoms of a disposition to bite mankind (*q*). An offer of compensation is no evidence of the *scienter* (*r*).

Ferocious dog for protection of premises.

There is authority for the proposition that a man is entitled to keep a ferocious dog for the protection of his premises, and to turn it loose at night (*s*). But in these days of law and order a defendant would have to make out a pretty clear case of such a strong precaution being really necessary to his safety.

Dog not entitled even to one worry.

By 28 & 29 Vict. c. 60, s. 1, it is enacted that "the owner of every dog shall be liable in damages for injury done to any *cattle* or *sheep* by his dog; and it shall not be necessary for the party seeking such damages to show a previous mischievous propensity in such dog, or the owner's knowledge of such previous propensity, or that the injury was attributable to neglect on the part of such owner." And a person is liable under this Act for injury done by his dog to sheep, although such sheep were trespassing on his land at the time when the injury was inflicted (*t*). *Horses* are "cattle" within the section (*u*).

Read *v.* Edwards

Generally, no action will lie against the owner of a dog which has invaded my garden and spoilt my crops; but in Read *v.* Edwards (*x*), it was held that an action lay against the owner of a dog, who, *knowing the animal to have a propensity for chasing and destroying game*, permitted it to be at large, the consequence of which was that the dog entered the plaintiff's wood and chased and destroyed young pheasants which were being reared there under domestic hens.

Dogs Act, 1871.

Under the Dogs Act, 1871 (*y*), stray or dangerous dogs may be destroyed or ordered by a Court of summary jurisdiction to be kept by the owner under proper control.

(*o*) Worth *v.* Gilling (1866), L. R. 2 C. P. 1.

(*p*) Beck *v.* Dyson (1815), 4 Camp. 198; 16 R. R. 774.

(*q*) Osborne *v.* Chocqueel, *supra*.

(*r*) Beck *v.* Dyson, *supra*.

(*s*) Brock *v.* Copeland (1794), 1 Esp. 203; 5 R. R. 730; Sarch *v.* Blackburn (1830), 4 C. & P. 300; M. & M. 505; Curtis *v.* Mills (1833), 5 C. & P. 489; 38 R. R. 843.

(*t*) Grange *v.* Silcock (1897), 77 L. T. 340; 46 W. R. 221.

(*u*) Wright *v.* Pearson (1869), L. R. 4 Q. B. 582; 38 L. J. Q. B. 312.

(*x*) (1864), 17 C. B. N. S. 245; 34 L. J. C. P. 31.

(*y*) 34 & 35 Vict. c. 56. And see Pickering *v.* Marsh (1874), 43 L. J. M. C. 143; and Rex *v.* Dymock (1901), 49 W. R. 618.

Stolen dogs.

It may be mentioned here, that it is a criminal offence to publish an advertisement offering a reward for the return of a stolen dog and stating that no questions would be asked (*z*).

Responsibility of owner for trespasses of cattle.

Ellis *v.* Loftus Iron Co.

A man is responsible for the trespasses of his cattle and other animals in which the law gives him a valuable property. Some years ago, a horse and mare in adjoining fields had a little neighbourly difference of opinion about some matter of equine interest, and finally the horse, with a sad lack of gallantry, *kicked the mare through the fence*. It was held that the owner of the horse, quite apart from any question of negligence, was liable for the injury so done to the mare (*a*). But the defendant might sometimes get on the right side of an action of this kind by showing that it was all through the plaintiff's not fencing properly, as he was bound by prescription or otherwise to do (*b*).

See Farrer *v.* Nelson (*c*) with regard to actions for overstocking land with game by which injury is done to crops.

Vis major.

Act of third party.

Nichols *v.* Marsland engrafts on the rule of Fletcher *v.* Rylands the qualification that, although a man brings on to his land what will do damage if it escapes, still he is not responsible if the escape is due to causes beyond his own control, and amounting to *vis major* (*d*); and in the later case of Box *v.* Jubb (*e*), the same Court held that for the wrongful act of a *third party*, which set the damage in motion, the proprietor was no more responsible than for *vis major*. Moreover, a man who brings water on to his land *in the ordinary, reasonable, and proper mode of enjoying his land*, is only liable for an escape which is attributable to negligence. Thus in Ross *v.* Fedden (*f*), it was held that the occupier of an upper floor, who had not been in any way negligent, was not liable to the occupier of a lower for the leakage of water from a water-closet of which he had the exclusive use.

Ross *v.* Fedden.

(*z*) See the Larceny Act, 1861 (24 & 25 Vict. c. 96), s. 102, and the Larceny Advertisements Act, 1870 (33 & 34 Vict. c. 65), s. 3. And see Mirams *v.* "Our Dogs" Publishing Co., [1901] 2 K. B. 564; 70 L. J. K. B. 879.

(*a*) Ellis *v.* Loftus Iron Co. (1874), L. R. 10 C. P. 10; 44 L. J. C. P. 24; but see Cox *v.* Burbidge (1863), 13 C. B. N. S. 430; 32 L. J. C. P. 89.

(*b*) See Lee *v.* Riley (1865), 18 C. B. N. S. 722; 34 L. J. C. P. 212; Rooth *v.* Wilson (1817), 1 B. & Ald. 59; 18 R. R. 431; Powell *v.* Salisbury (1828), 2 Y. & J. 391; 31 R. R. 607; Tillett *v.* Ward (1882), 10 Q. B. D. 17; 52 L. J. Q. B. 61.

(*c*) (1885), 15 Q. B. D. 258; 54 L. J. Q. B. 385.

(*d*) See also Thomas *v.* Birm. Canal Co. (1879), 43 L. T. 435; 49 L. J. Q. B. 851.

(*e*) (1879), 4 Ex. D. 76; 48 L. J. Ex. 417; and see Carstairs *v.* Taylor (1871), L. R. 6 Ex. 217; 40 L. J. Ex. 29.

(*f*) (1872), L. R. 7 Q. B. 661; 41 L. J. Q. B. 270; and see Blake *v.* Woolf, [1898] 2 Q. B. 426; 67 L. J. Q. B. 813.

In Dixon *v.* The Metropolitan Board of Works (*g*), the action was by a coal merchant to recover damages for injury to a barge, coals, &c. belonging to him, caused by the defendants' negligence. On the 29th of August, 1879, there was an exceptionally heavy rainfall, and the defendants had opened the water-gates of one of their sewers to prevent a large district from being flooded. There was, of course, a great rush of water, and the coal-merchant's belongings were swept away before it. It was held that, as the injury was caused by the opening of the water-gates, and not by the act of God, the defendants were *primâ facie* liable for the damage done, within the principle of Fletcher *v.* Rylands, but that, as they were a public body acting in the discharge of a public duty, and as that which happened was only the inevitable result of what Parliament had authorized them to do, they were *not* liable. Dixon *v.* Metropolitan Board of Works.

As to the liability of neighbouring mine-owners, it was held, in Smith *v.* Kenrick (*h*), that the owner of a colliery lying on a higher level than another was not responsible for damage done to the latter by its being flooded through the usual and proper taking of coal from the former. But a man cannot work a mine which can only be worked by letting in a river and flooding a neighbour's mine (*i*); and where a mine-owner diverts the course of a stream, he must take care that the new course provided for it shall be sufficient to prevent mischief from an overflow (*k*). Smith *v.* Kenrick.

Smith *v.* Kenrick was discussed and distinguished in the case of the Attorney-General *v.* Tomline (*l*), where it was held that an action would lie by the Attorney-General, at the relation of the owner of the land within, to restrain the owner of the foreshore from removing the shingle in such a manner as to endanger the land within by exposing it to inroads of the sea. Colonel Tomline's case.

See also Whalley *v.* Lanc. & Yorks. Ry. Co. (*m*), where the defendants were held liable for having, in self-protection, transferred a quantity of water, the result of an unprecedented rainfall, to adjoining lands, by cutting trenches in their embankment. Whalley's case.

(*g*) (1881), 7 Q. B. D. 418; 50 L. J. Q. B. 772; but see Powell *v.* Fall (1880), 5 Q. B. D. 597; 49 L. J. Q. B. 428; Sadler *v.* South Staffordshire, &c. Tramways Co. (1889), 23 Q. B. D. 17; 58 L. J. Q. B. 421.

(*h*) (1849), 7 C. B. 515; 18 L. J. C. P. 172.

(*i*) Crompton *v.* Lea (1874), L. R. 19 Eq. 115; 44 L. J. Ch. 69.

(*k*) Fletcher *v.* Smith (1877), 2 App. Cas. 781; 47 L. J. Ex. 4; and see Baird *v.* Williamson (1863), 15 C. B. N. S. 376; 33 L. J. C. P. 101.

(*l*) (1880), 14 Ch. D. 58; 49 L. J. Ch. 377.

(*m*) (1884), 13 Q. B. D. 131; 53 L. J. Q. B. 285.

Proximate Cause.

[108] SCOTT *v.* SHEPHERD. (1773)

[2 W. Bl. 892.]

Shepherd determined to celebrate the happy deliverance of King James I., in the orthodox fashion; and with that intention, he, some days before the 5th, laid in a plentiful pyrotechnic supply. Being not only of a pious and patriotic spirit, but also a man not destitute of humour, he threw a lighted squib into the market-house at a time when it was crowded with those that bought and sold. The fiery missile came down on the shed of a vendor of gingerbread, who, to protect himself, caught it dexterously and threw it away from him. It then fell on the shed of another ginger-bread seller, who passed it on in precisely the same way; till at last it burst in the plaintiff's face and put his eye out.

Scott brought an action against the original thrower of the squib, who objected that he was not responsible for what had happened, when the squib had passed through so many hands: but though he persuaded the learned Mr. Justice Blackstone to agree with him, the majority of the Court decided that he *must be presumed to have contemplated all the consequences* of his wrongful act, and was answerable for them.

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[109] SHARP *v.* POWELL. (1872)

[L. R. 7 C. B. 253; 41 L. J. C. P. 95.]

In defiance of an Act of Parliament, a corn-merchant's servant washed one of his master's vans in the street of a town. In warm weather no harm would have come of this

improper proceeding; the water would have found its way down a gutter and through a grating. But it happened to be very frosty, and (though the law-breaking servant did not know it) the grating was frozen over. The consequence was that the water, finding no escape, flowed about and formed a great sheet of ice, on which the plaintiff's horse slipped and got hurt.

The owner of the injured horse brought an action against the corn merchant, but it was held that, however improper it might be to wash a van in the public street, this was *not the proximate cause* of the injury; for the servant *could not be expected to foresee* that the consequence of his act would be that the water would freeze over so large a portion of the street as to occasion a dangerous nuisance (*n*).

Probably no case, except perhaps Coggs *v.* Bernard, is better known to the superficial student than the "squib case." It cannot be said, however, that its importance is equal to its popularity. In days gone by it served to illustrate the distinction between the action of trespass and the action on the case; but it is now chiefly worth remembering as an authority on questions of consequential damage.

Ordinary and probable consequence.

The rule is that damage to be actionable must be the ordinary and probable consequence of the act complained of; in other words, the act must be the proximate cause of the damage. If a candidate for parliamentary honours makes a stump oration inveighing at his opponents generally, that is not the proximate cause of one of those opponents getting his windows or his head broken (*o*). Generally, however, a man must be taken to contemplate all the consequences of his acts, and is responsible for them. A railway company negligently sent some empty trucks down an incline into a siding. The consequence was that a herd of cattle being driven along an occupation road got frightened, ran away, and after breaking down a fence or two succeeded in getting killed on quite another part of the company's line. The company were held

Sneesby's case.

(*n*) But see Hardaker *v.* Idle District Council, [1896] 1 Q. B. 335; 65 L. J. Q. B. 363.

(*o*) Peacock *v.* Young (1869), 18 W. R. 134; 21 L. T. 527.

Clark *v.* Chambers.

responsible to the owner of the cattle (*p*). In another case (*q*) the following facts appeared. The occupier of a field used for athletic sports put a barrier with iron spikes across the adjoining road, in order that the British public might not see the sports without paying. Somebody removed this barrier, and put it in a dangerous position across the footpath. The plaintiff was lawfully passing along this footpath at night, when his eye came in contact with one of the spikes. It was held that the occupier of the field, who had taken liberties with the road which he had no business to take, was liable notwithstanding the intervention of a third party. To take another case (*r*), the proprietor of a van and ploughing apparatus left it by the grassy side of a road to remain there all night. While it was there a farmer came by driving a mare, a confirmed kicker, though not so to his knowledge. The brute shied at the van, ran away, and kicked the farmer to death. In an action under Lord Campbell's Act, it was held that the van proprietor was liable (*r*). "Though the immediate cause of the action," said the Court, "was the kicking of the mare, still the unauthorised and dangerous appearance of the van and plough on the side of the highway was, within the meaning of the law, the proximate cause of the accident." A recent decision on this subject is the case of Halestrap *v.* Gregory(*s*). There the defendant owned a field in which he took horses for agistment. This field was separated from another, let to a cricket club, by a wire fence, and there was a gate between the two fields. The plaintiff delivered a mare to the defendant for agistment. The defendant's servant negligently left the gate open, and the mare strayed into the cricket field. The cricketers tried to drive her back through the gate, using proper care and precaution, but she ran against the wire fence and sustained injuries. It was held that the defendant was liable; the natural consequence of the gate being left open was injury to the mare. "It is," said Wills, J. (with evident recollections of Pickwick), "the nature of an animal which has escaped from its own proper enclosure to resist either attempts to catch it or any well-meant endeavours to send it back again. It is a difficult thing to catch a stray horse which does not want to be caught and taken back to his proper inclosure; and it is by no means unnatural that a horse when driven back, even

Harris *v.* Mobbs.

The mare in the cricket field.

(*p*) Sneesby *v.* Lancashire & Yorkshire Ry. Co. (1875), 1 Q. B. D. 42; 45 L. J. Q. B. 1; and see The Gertor (1894), 70 L. T. 703; 7 Asp. M. C. 472.

(*q*) Clark *v.* Chambers (1878), 3 Q. B. D. 327; 47 L. J. Q. B. 427.

(*r*) Harris *v.* Mobbs (1878), 3 Ex. D. 268; 39 L. T. 164; and see Wilkins *v.* Day (1883), 12 Q. B. D. 110; 49 L. T. 399.

(*s*) [1895] 1 Q. B. 561; 64 L. J. Q. B. 415.

carefully as this mare was, should make a bolt of it. If there be wire fencing, it would be very likely to injure itself."

Engelhart v. Farrant.

Where the negligence of a servant is an effective cause of an injury, the intervention, between the negligence of the servant and the injury, of the negligence of another person which immediately causes the injury, does not relieve the master from his liability for the negligence of his servant. This is illustrated by the recent case of Engelhart *v.* Farrant (*t*): the defendant sent out with a horse and cart for the delivery of parcels a driver, whose duty it was to drive the cart, and a youth, whose duty it was to deliver the parcels, but not to drive at all; the driver left the cart, and during his absence the youth, in order to further the defendant's business, proceeded to turn the cart round, and while so doing caused injury to the plaintiff's vehicle; and it was held that the negligence of the driver in leaving the cart without proper attendance was an effective cause of the injury, for which the defendant was liable, in spite of the intervention of the act of the youth, outside the scope of his employment, which was the proximate cause of the injury.

Victorian Ry. Coms. v. Coultas.

An important (but not very satisfactory) decision on remoteness of damage was given by the Privy Council in the case of Victorian Railway Commissioners *v.* Coultas (*u*). A husband and wife were driving in a buggy across a level railway crossing, when, owing to the negligence of the gatekeeper, the buggy was nearly but not quite run down by a passing train. The wife fainted and received a severe nervous shock from the fright, and in consequence afterwards suffered a severe illness. It was held, however, that the damage was too remote to be recovered. This case, however, was discussed and not followed by the Divisional Court in the recent case of Dulieu *v.* White (*x*), and it was held that damages for injuries resulting from a nervous shock caused by fright may be recovered in an action for negligent driving, although there has been no actual physical impact upon the plaintiff's person. The following passage from Sir F. Pollock's valuable treatise on the Law of Torts (6th ed. p. 51) contains, it is submitted, an accurate view of the law on this point: "The true question would seem to be whether the fear in which the plaintiff was put by the defendant's

Dulieu v. White.

(*t*) [1897] 1 Q. B. 240; 66 L. J. Q. B. 122; and see McDowall *v.* G. W. Ry. Co., [1903] 2 K. B. 331; 72 L. J. K. B. 652.

(*u*) (1888), 13 App. Cas. 222; 57 L. J. C. P. 69; but see Bell *v.* G. N. Ry. Co. (1890), 26 L. R. Ir. 428; Pugh *v.* L. B. & S. C. Ry. Co., [1896] 2 Q. B. 248; 65 L. J. Q. B. 521; Wilkinson *v.* Dounton, [1897] 2 Q. B. 57; 66 L. J. Q. B. 493; and Mayne on Damages, 6th ed. 51.

(*x*) [1901] 2 K. B. 669; 70 L. J. K. B. 837; and see the recent Scotch case of Cooper *v.* Caledonian Ry. Co. (1902), 4 F. 880.

wrongful or negligent conduct was such as, in the circumstances, would naturally be suffered by a person of ordinary courage and temper, and such as might thereupon naturally and probably lead, in the plaintiff's case, to the physical effects complained of."

Some American cases.

The principle of Scott *v.* Shepherd has been applied in a curious American case, where the defendant (with a certain amount of provocation) had seized a pickaxe and chased a little black boy through the streets of a town. The boy, in terror for his life, bolted into the plaintiff's store, and in his hurry knocked over a cask of wine. It was held that the defendant must pay for the good liquor lost (*y*). "There is nearly as much reason," said the Court, "for holding him liable for driving the boy against the wine cask, and thus destroying the plaintiff's property, as there would have been if he had produced the same result by throwing the boy upon the cask, in which case his liability could not have been questioned." So, in the American leading case of Fent *v.* The Toledo Railway Company (59 Ill. 349), it was held that a railway company might be responsible to any extent to which a fire wrongfully caused by a spark from one of their engines might spread. "If loss has been caused by the act," said Lawrence, C. J., "and it was under the circumstances a natural consequence which any reasonable person could have anticipated, then the act is a proximate cause whether the house burned was the first or the tenth,—the latter being so situated that its destruction is a consequence reasonably to be anticipated from setting the first on fire" (*z*). But in the American case of Scheffer *v.* Washington, &c. Railway Co. (*a*), it was held that where an injury to a passenger by the negligence of the railway company carrying him caused insanity, by reason of which he committed suicide, the injury was not the proximate cause of the death, and the company were not liable for such death.

The Salvation Army.

The case of Beatty *v.* Gillbanks (*b*) may be mentioned here as bearing indirectly on proximate cause. At Weston-super-Mare some eccentric religionists, calling themselves the Salvation Army, assembled and marched in procession through the streets of the town. Though their intention was lawful and innocent enough—that of singing hymns, and otherwise enjoying themselves in an emotional manner—they knew they were hated by the roughs, and that an attempt would be made to disturb the arrangements,

(*y*) Vanderburgh *v.* Truax (1847), 4 Den. N. Y. 464.

(*z*) See Smith *v.* L. & S. W. Ry. Co. (1870), L. R. 6 C. P. 14; 40 L. J. C. P. 21.

(*a*) Law Times, Aug. 26th, 1882.

(*b*) (1882), 9 Q. B. D. 308; 51 L. J. M. C. 117.

with the probable result of a breach of the peace. In spite of this knowledge, it was held that they could not be rightly convicted of an unlawful assembly. "As far as these appellants are concerned," said Field, J., "there was nothing in their conduct when they were assembled together which was either tumultuous or against the peace. But it is said that the conduct pursued by them on this occasion was such as on several previous occasions had produced riots and disturbance of the peace and terror to the inhabitants, and that the appellants, knowing when they assembled together that such consequences would again arise, are liable to this charge. Now, I entirely concede that *everyone must be taken to intend the natural consequences of his own acts*, and it is clear to me that if this disturbance of the peace was *the natural consequence* of acts of the appellants, they would be liable, and the justices would have been right in binding them over. But the evidence set forth in the case does not support this contention; on the contrary, it shows that the disturbances were caused by other people antagonistic to the appellants, and that no acts of violence were committed by them."

Responsibility for collecting crowds.

But "it is an old principle of law, that, if a person collects together a crowd of people to the annoyance of his neighbours, that is a nuisance for which he is answerable. Therefore, where the defendant was in the habit of inviting persons into his own grounds to shoot pigeons, and the effect of that was that idle persons collected *near* the spot, trod down the grass of the neighbouring meadows, destroyed the fences, and created alarm and disturbance amongst the women and children in the adjoining thoroughfares, it was held that the defendant was guilty of a nuisance (*c*). So, where the defendant descended in a balloon into the plaintiff's garden, and a number of persons rushed into the garden to render help and gratify their curiosity, and destroyed the plaintiff's hedges and crops, it was held that the defendant who had set the balloon in motion and caused the mischief was responsible for the injury" (*d*). This subject was dealt with at length by North, J., in the case of Barber *v.* Penley (*e*), where most of the earlier cases are referred to and explained.

The case of "Charley's Aunt."

(*c*) R. *v.* Moore (1832), 3 B. & Ad. 184; 1 L. J. (N. S.) M. C. 30; Walker *v.* Brewster (1867), L. R. 5 Eq. 25; 37 L. J. Ch. 33; but see Germaine *v.* London Exhibitions, Ld. (1896), 75 L. T. 101; and Chase *v.* London County Council (1898), 62 J. P. 184.

(*d*) Guille *v.* Swan (1822), 19 Johns. (U. S. R.) 381; Add. Torts, p. 127 (7th ed.). See also Glover *v.* L. & S. W. Ry. Co. (1867), L. R. 3 Q. B. 25; 37 L. J. Q. B. 57; Metropolitan Ry. Co. *v.* Jackson (1877), 3 App. Cas. 193; 47 L. J. C. P. 303.

(*e*) [1893] 2 Ch. 447; 62 L. J. Ch. 623; and see Bellamy *v.* Wells (1891), 60 L. J. Ch. 156; 63 L. T. 635.

Negligence.

[110] READHEAD *v.* MIDLAND RAILWAY CO. (1869)

[L. R. 4 Q. B. 379; 38 L. J. Q. B. 169.]

Mr. Readhead was a passenger from Nottingham to South Shields, and on the journey the carriage in which he was travelling left the metals and was upset. This mishap was occasioned by the breaking of the tyre of one of the wheels of the carriage, owing to a latent defect in the tyre which was not attributable to any fault on the part of the manufacturer, and could not be detected previously to the breaking. This being so, it was held that, though Mr. Readhead might have sustained very severe injuries, the company were under no obligation to make him compensation. It may be mentioned, however, that in the Court below Mr. Justice Blackburn had delivered a strong dissenting judgment against the railway company.

Duty of carrier of passengers.

Carriers of *passengers* are not, like carriers of *goods*, insurers; and, accordingly, before one of their victims can recover damages, he must prove a breach of duty (*f*). Their duty is—as was said in the leading case—"*to take due care* (*including in that term the use of skill and foresight*) *to carry the passenger safely, and is* not *a warranty that the carriage in which he travels shall be in all respects fit for its purpose*" (*g*).

(*f*) See Cobb *v.* G. W. Ry. Co., [1894] A. C. 419; 63 L. J. Q. B. 629, where the defendants were held not liable to a passenger who had been robbed while travelling in a railway carriage which was overcrowded owing to the negligence of their servants. See also Pounder *v.* N. E. Ry. Co., [1892] 1 Q. B. 385; 61 L. J. Q. B. 136; and East India Ry. *v.* Kalidas Mukerjee, [1901] A. C. 396; 70 L. J. P. C. 63.

(*g*) It should be observed that, apart altogether from contract, there is a duty upon a carrier to exercise due and reasonable care even though the conveyance is gratuitous. See *ex. gr.*, the recent case of Harris *v.* Perry & Co., [1903] 2 K. B. 219; 72 L. J. K. B. 725.

In the case of Hyman *v.* Nye (*h*) (where the plaintiff had hired from the defendant, a jobmaster, for a drive from Brighton to Shoreham and back, a carriage, a pair of horses, and a driver, and an accident had occurred), it was held that the duty of a jobmaster who lets out carriages, &c., is to supply a carriage as fit for the purpose for which it is hired as care and skill can make it, "and if, whilst the carriage is being properly used for such purpose, it breaks down, it becomes incumbent on the person who has let it out to show that the breakdown was in the proper sense of the word an accident not preventible by any care or skill. If he can prove this, as the defendant did in Christie *v.* Griggs (1810), 2 Camp. 80; 11 R. R. 666, and as the railway company did in Readhead *v.* Midland Ry. Co., he will not be liable; but no proof short of this will exonerate him" (*i*). Hyman *v.* Nye.

In an action for personal injuries the great obstacle to the plaintiff's success generally is to prove that the act complained of was either wilful or negligent. The defendant cannot be made responsible for a mere accident. In Holmes *v.* Mather (*k*), a gentleman at North Shields had tried some horses for the first time in double harness. The horses did not take kindly to it, and the plaintiff got knocked down. "The driver," said Bramwell, B., "is absolutely free from all blame in the matter; not only does he not do anything wrong, but he endeavours to do what is best to be done under the circumstances. The misfortune happens through the horses being so startled by the barking of a dog that they run away with the groom and the defendant who is sitting beside him. Now, if the plaintiff under such circumstances can bring an action, I really cannot see why she could not bring an action because a splash of mud, in the ordinary course of driving, was thrown upon her dress, or got into her eye, and so injured it. . . . *For the convenience of mankind in carrying on the affairs of life, people as they go along roads must expect, or put up with, such mischief as reasonable care on the part of others cannot avoid.*" In another well-known case (*l*), a coachman drove his coach against a bank. He had been past the same spot only twelve hours before, but in the interval a cottage which served him as a landmark had been pulled down and carted away. It was held that this was an accident for which no one Accident not imputable.

(*h*) (1881), 6 Q. B. D. 685; 44 L. T. 919; and see Gilbert *v.* North London Ry. Co. (1883), 1 C. & E. 31; Mobray *v.* Merryweather, [1895] 2 Q. B. 640; 65 L. J. Q. B. 50; and Vogan *v.* Oulton (1898), 79 L. T. 384.

(*i*) Per Lindley, J.

(*k*) (1875), L. R. 10 Ex. 261; 44 L. J. Ex. 176.

(*l*) Crofts *v.* Waterhouse (1825), 3 Bing. 319; 4 L. J. C. P. 75.

Manzoni *v.* Douglas.

could be made responsible. So in the case of Manzoni *v.* Douglas (*m*), where a horse drawing a brougham in a London street had suddenly and without apparent reason bolted and knocked the plaintiff down, it was held that an action could not be maintained. "To hold," said Lindley, J., "that the mere fact of a horse bolting is *per se* evidence of negligence would be mere reckless guesswork." The American case of Brown *v.* Kendall (*n*) also illustrates this point. The dogs of plaintiff and defendant got fighting, and the defendant, in trying to separate them with a long stick, unfortunately knocked out the eye of the plaintiff, who was standing behind him. It was held that the defendant was not liable for this mischief. "If," said Shaw, C. J., "in the prosecution of a lawful act, a casualty, purely accidental, arises, no action can be supported for an injury arising therefrom."

Respective provinces of judge and jury.

In an action arising for personal injuries by negligence, it is the province *of the judge* to say whether there is evidence from which negligence *may* be reasonably inferred, and *of the jury* (if the evidence is left to them) to say whether it *ought* to be inferred (*o*).

Res ipsa loquitur.

Sometimes, however, *res ipsa loquitur;* the mere happening of a disaster may be sufficient to raise a presumption of negligence, which the defendant must rebut if he can. This is so, for instance, where the thing that caused the mischief was so exclusively under the defendant's control, that it is hardly credible that any harm could have come from it without his default. A gentleman was once guilelessly walking down a Liverpool street when suddenly a barrel of flour came down on his head from the upper window of a flour dealer's shop. In an action against the flour dealer, it was held that *the mere unexplained fact of the accident happening at all* was evidence of negligence (*p*). The same principle of law was laid down in a case where a custom-house officer, lawfully in some docks, was knocked down by a bag of sugar lowered by a crane overhead (*q*); and in a third case, where a brick fell from a railway bridge on a person walking peaceably along the Queen's highway below (*r*).

(*m*) (1880), 6 Q. B. D. 145; 50 L. J. Q. B. 289; and see Hammack *v.* White (1862), 11 C. B. N. S. 588; 39 L. J. C. P. 129.

(*n*) (1850), 6 Cush. 292.

(*o*) Metr. Ry. Co. *v.* Jackson (1877), 3 App. Cas. 193; 47 L. J. C. P. 303; and see Dublin, &c. Ry. Co. *v.* Slattery (1878), 3 App. Cas. 1155; 39 L. T. 365; and Smith *v.* S. E. Ry. Co., [1896] 1 Q. B. 178; 65 L. J. Q. B. 219.

(*p*) Byrne *v.* Boadle (1863), 2 H. & C. 722; 33 L. J. Ex. 13; but see Crisp *v.* Thomas (1891), 63 L. T. 756; 55 J. P. 261.

(*q*) Scott *v.* London Docks Co. (1865), 3 H. & C. 596; 34 L. J. Ex. 220.

(*r*) Kearney *v.* L. B. & S. C. Ry. Co. (1871), L. R. 6 Q. B. 759; 40 L. J. Q. B. 285. See also Skinner

A railway passenger, it has been held, is entitled to assume that the door is properly shut, and to act accordingly (*s*). And the moral of another case (*t*) seems to be that if it happens that the door is not shut, or if it flies open, the passenger had better not make any effort to close it, but get to the other side of the carriage, and let it bang itself to splinters. Door flying open.

It is not evidence of negligence on the part of servants of a railway company that they close railway carriage doors, left open by passengers who have quitted the train, without warning other passengers still seated in the carriages that they are about to do so; and a passenger, so left seated, who places his finger in the hinge of the open door of the carriage as it is being closed by the company's servant cannot recover damages for personal injuries (*u*). Closing carriage door.

A good many actions against railway companies are brought by persons who have sustained hurt by trains overshooting the platforms, or not getting properly up to them. The mere fact of a train doing a thing of this kind is not evidence of negligence; but in such a case it becomes the duty of the railway servants to take immediate steps to prevent people getting out and hurting themselves. The shouting out the name of the station is not necessarily an invitation to alight; but the bringing up of the train to a final standstill at a station, at all events after such a time has elapsed that the passengers may reasonably infer that they are expected to get out, is an invitation. The following cases may be consulted in support of this statement of the law:—Cockle *v.* S. E. Ry. Co. (1872), L. R. 7 C. P. 321; 41 L. J. C. P. 140; Praeger *v.* Brist. & Ex. Ry. Co. (1870), 24 L. T. 105; Bridges *v.* North London Ry. Co. (1874), L. R. 7 H. L. 213; 43 L. J. Q. B. 151; Robson *v.* N. E. Ry. Co. (1876), 2 Q. B. D. 85; 46 L. J. Q. B. 50; Siner *v.* G. W. Ry. Co. (1869), L. R. 4 Ex. 117; 38 L. J. Ex. 67; Rose *v.* N. E. Ry. Co. (1876), 2 Ex. D. 248; 46 L. J. Ex. 374; Lax *v.* Darlington (1879), 5 Ex. D. 28; 49 L. J. Ex. 105; Weller *v.* L. B. & S. C. Ry. Co. (1874), L. R. 9 C. P. 126; 43 L. J. C. P. 137; Hellawell *v.* L. & N. W. Ry. Co. (1872), 26 L. T. 557; Thompson *v.* Belfast Ry. Co. (1871), Ir. Rep. 5 C. L. 517. Train not alongside platform. Invitation to alight.

The omission to take a precaution enjoined by statute (*e.g.*, to Statutory precaution

v. L. B. & S. C. Ry. Co. (1850), 5 Ex. 787; 15 Jur. 299; Carpue *v.* L. B. & S. C. Ry. Co. (1844), 5 Q. B. 747; 13 L. J. Q. B. 138; Bird *v.* G. N. Ry. Co. (1858), 28 L. J. Ex. 3.

(*s*) Gee *v.* Metr. Ry. Co. (1873), L. R. 8 Q. B. 161; 42 L. J. Q. B. 105.

(*t*) Adams *v.* Lanc. & Y. Ry. Co. (1869), L. R. 4 C. P. 739; 38 L. J. C. P. 277.

(*u*) Drury *v.* N. E. Ry. Co., [1901] 2 K. B. 322; 70 L. J. K. B. 830.

disregarded. keep a gate at a level crossing) amounts to negligence (*x*). But the omission to guard against extraordinary accidents is not negligence (*y*); nor is the omission of a merely voluntary precaution (*z*).

Voluntary precaution dropped. Each case, however, depends on its own circumstances. In Shepherd *v.* Midl. Ry. Co. (*a*), the action was by a Bedfordshire attorney who, while smoking a cigar on the platform of the Ampthill Station, and waiting for his train, one frosty day in 1870, "felt his legs suddenly go from under him, and fell heavily on the platform, where he lay until assistance was procured to enable him to rise." The cause of this accident was a strip of ice; and the plaintiff considered he was entitled to damages out of the railway company. In this view he was confirmed by the judges. "It strikes me," said Martin, B., "that the railway servants ought to be *on the alert during such weather* to see that there is no ice upon the platform, and to remove it, or render it harmless, if there."

Ice on railway platform.

Frightening horses. In the case of Simkin *v.* L. & N. W. Ry. Co. (*b*), it was held that a railway company is not guilty of negligence in not screening their line from an approach road to their station, so as to prevent horses being alarmed by the sight of locomotives.

Delaying the doctor. In a recent Irish case (*c*), the plaintiff, a medical man, whose time was of pecuniary value, was, while driving along a public highway, detained for twenty minutes at a level crossing by the unreasonable and negligent delay of the defendant railway company's servants in opening the gates at the crossing, and it was held, that the defendants were liable in damages to the plaintiff for such delay.

Passenger carried at own risk. It is to be observed that a passenger may enter into a special contract with the carrier to be carried at his own risk; and in that case no amount of negligence would found an action (*d*). Such a condition exempts a railway company from responsibility, not only

(*x*) See Stapley *v.* L. B. & S. C. Ry. Co. (1865), L. R. 1 Ex. 21; 35 L. J. Ex. 7; Wanless *v.* N. E. Ry. Co. (1874), L. R. 7 H. L. 12; 43 L. J. Q. B. 185; Wright *v.* G. N. Ry. Co. (1881), L. R. (Ir.) 8, 257; Wakelin *v.* L. & S. W. Ry. Co. (1886), 12 App. Cas. 41; 56 L. J. Q. B. 229; and see [1896] 1 Q. B. 189; and 65 L. J. Q. B. 224; Fenna *v.* Clare, [1895] 1 Q. B. 199; 64 L. J. Q. B. 238; and Smith *v.* S. E. Ry. Co., [1896] 1 Q. B. 178; 65 L. J. Q. B. 219.

(*y*) Blyth *v.* Birm. Waterworks Co. (1856), 11 Ex. 781; 25 L. J. Ex. 210; and Thomas *v.* Birm. Canal Co. (1879), 43 L. T. 435; 49 L. J. Q. B. 851.

(*z*) Skelton *v.* L. & N. W. Ry. Co. (1867), L. R. 2 C. P. 631; 36 L. J. C. P. 249.

(*a*) (1872), 25 L. T. 879; 20 W. R. 705.

(*b*) (1888), 21 Q. B. D. 453; 59 L. T. 797.

(*c*) Boyd *v.* G. N. Ry. Co. (1895), 2 Ir. R. 555.

(*d*) M'Cawley *v.* Furness Ry. Co. (1872), L. R. 8 Q. B. 57; 42 L. J. Q. B. 4; Gallin *v.* L. & N. W. Ry. Co. (1875), L. R. 10 Q. B. 212; 44 L. J. Q. B. 89.

during the journey, but also *while the passenger is coming to or leaving their premises*. And it even extends to protect another railway company over whose line the company making the special contract have running powers (*e*). The condition is usually imposed on a drover in charge of cattle who receives a free pass (*f*).

Fences.

A railway company are required by the 68th section of the Railway Clauses Act, 1845 (*g*), to make and maintain fences, &c., for the accommodation of the owners and occupiers of adjoining lands, and they will therefore be liable to those owners and occupiers for losses resulting through breach of this statutory duty (*h*). But if cattle stray into a field adjoining the line, and thence get on to the line and are killed, the company will not be responsible (*i*).

The cow and the statue.

Market owners who take toll from persons attending the market with their cattle are bound to keep the market in a reasonably safe condition, and on this ground the mayor, aldermen, and burgesses of the borough of Darlington were held liable for the loss of a cow which was so irreverent and, as it turned out, so indiscreet as to try to jump over a spiked fence surrounding the statue of a local hero (*k*). So, in the case of Francis *v.* Cockrell (*l*), it was held that "where money is paid by spectators at races or other public exhibitions for the use of temporary stands or platforms, there is *an implied warranty on the part of the person receiving the money* that due care has been used in the construction of the stand by those whom he has employed as independent contractors to do the work as well as by himself."

Randall *v.* Newson.

The limitation of the leading case as to latent defects does not apply to the sale of a chattel where there is an implied warranty. In Randall *v.* Newson (*m*), a man bought of a coach-builder a polo for his carriage. Though the coach-builder was guilty of no negligence in the matter, the pole turned out defective and broke,

(*e*) Hall *v.* N. E. Ry. Co. (1875), L. R. 10 Q. B. 437; 44 L. J. Q. B. 164.

(*f*) See Duff *v.* G. N. Ry. Co. (1878), 4 L. R. (Ir.) 178; 41 L. T. 197.

(*g*) 8 & 9 Vict. c. 20.

(*h*) See Corry *v.* G. W. Ry. Co. (1881), 7 Q. B. D. 322; 50 L. J. Q. B. 386; Charman *v.* S. E. Ry. Co. (1888), 21 Q. B. D. 524; 57 L. J. Q. B. 597; and Dixon *v.* G. W. Ry. Co., [1897] 1 Q. B. 300; 66 L. J. Q. B. 132.

(*i*) Ricketts *v.* East, &c. Docks and Ry. Co. (1852), 12 C. B. 160; 21 L. J. C. P. 201; and see Manchester, &c. Ry. Co. *v.* Wallis (1854), 14 C. B. 213; 23 L. J. C. P. 85; Buxton *v.* N. E. Ry. Co. (1868), L. R. 3 Q. B. 549; 37 L. J. Q. B. 258; and Luscombe *v.* G. W. Ry. Co., [1899] 2 Q. B. 313; 68 L. J. Q. B. 711.

(*k*) Lax *v.* Darlington (1879), 5 Ex. Div. 28; 49 L. J. Ex. 105.

(*l*) (1870), L. R. 5 Q. B. 501; 39 L. J. Q. B. 291.

(*m*) (1877), 2 Q. B. D. 102; 46 L. J. Q. B. 257.

frightening and injuring the horses. It was held that the coach-builder was liable.

For Lord Campbell's Act (9 & 10 Vict. c. 93), see *post*, p. 606.

Greenland *v.* Chaplin.

As to the liability of a person for the consequences of his negligence, the following remark of Pollock, C. B., in the well-known contributory negligence case of Greenland *v.* Chaplin (*n*) (where an anchor fell on a steamboat passenger) may be quoted:—"I entertain considerable doubt whether a person who has been guilty of negligence is responsible for all the consequences which may under any circumstances arise, and in respect of mischief which could by no possibility have been foreseen, and which no reasonable person would have anticipated. I am inclined to consider the rule of law to be this: that a person is expected to anticipate and guard against all reasonable consequences, but that he is not by the law of England expected to anticipate and guard against that which no reasonable man would expect to occur." See also Hurst *v.* Taylor (*o*), with regard to the duty of fencing a footpath in case of diversion.

Contributory Negligence.

[111] BUTTERFIELD *v.* FORRESTER. (1809)

[11 East, 60; 10 R. R. 433.]

Forrester, while engaged in repairing his house, was guilty of the unlawful act of putting poles across the king's highway. Just about dusk, one August evening, while things were in this improper state, Butterfield was riding home. With reckless disregard for his own and the lieges' safety, he went galloping through the streets "as fast as his horse could go"; and he rode plump up

(*n*) (1850), 5 Exch. 243; 19 L. J. Ex. 293; and see Scott *v.* Shepherd, *ante*, p. 456.

(*o*) (1885), 14 Q. B. D. 918; 54 L. J. Q. B. 310; and see Barnes *v.* Ward (1850), 9 C. B. 392; 19 L. J. C. P. 195; Hawker *v.* Shearer (1887), 56 L. J. Q. B. 284.

against Forrester's obstruction and had a nasty fall. He brought this action for damages; but his own careless riding was held to be as complete an obstacle to his success as Forrester's pole had been to his horse. "A party," said Lord Ellenborough, C. J., "is not to cast himself upon an obstruction which has been made by the fault of another and avail himself of it, if he do not himself use common and ordinary caution to be in the right. . . . One person being in fault will not dispense with another's using ordinary care for himself."

DAVIES *v.* MANN. (1842) [112]

[10 M. & W. 546; 12 L. J. Ex. 10.]

The owner of a donkey fettered its forefeet, and in that helpless condition turned it into a narrow lane. The animal had not disported itself there very long when a heavy waggon belonging to the defendant came rumbling along. It was going a great deal too fast, and was not being properly looked after by its driver; the consequence was that it caught the poor beast, which could not get out of the way, and killed it. The owner of the donkey now brought an action against the owner of the waggon, and, in spite of his own stupidity, was allowed to recover, on the ground that *if the driver of the waggon had been decently careful, the consequences of the plaintiff's negligence would have been averted.* "Although," said Parke, B., "the ass may have been wrongfully there, still the defendant was bound to go along the road at such a pace as would be likely to prevent mischief. Were this not so, a man might justify the driving over goods left on a public

highway, or even over a man lying asleep there, or the purposely running against a carriage going on the wrong side of the road."

Volenti non fit injuria.

The doctrine of contributory negligence is based on the maxim *volenti non fit injuria*. The man who is the author of his own wrong merits nobody's sympathy; he does not come into Court with clean hands. "If," says Domat, "one goes across a public cricket-ground whilst they are playing there, and the ball being struck chances to hurt him, the person to blame is not the innocent striker of the ball, but he who imprudently sought out the danger." Other cases on this subject are Thrussell *v.* Handyside (1888), 20 Q. B. D. 359; 57 L. J. Q. B. 347; Osborne *v.* London and North Western Ry. Co. (1888), 21 Q. B. D. 220; 57 L. J. Q. B. 618; and Membery *v.* Great Western Ry. Co. (1889), 14 App. Cas. 179; 58 L. J. Q. B. 563.

When plaintiff may recover in spite of his negligence.

But Davies *v.* Mann engrafts an important qualification on the rule that the negligence of the plaintiff himself disentitles him to complain of the defendant's negligence. *If the defendant by being ordinarily careful would have averted the consequences of the plaintiff's negligence*—in other words, if the regrettable accident would never have happened if the defendant had behaved as he ought to have done—then the plaintiff is entitled to recover in spite of his negligence. A penny steamer negligently ran down a barge on the Thames. The barge had not ported, and no look-out was kept on board. But this undoubted negligence of the barge was held not such as to prevent her owners from obtaining compensation from the steamboat people (*p*). In the river Colne, in Essex, an oyster bed was so placed as to be a public nuisance, yet its proprietors successfully went to law against a person who ran his vessel against it when he might have managed better (*q*). In a third and later case some colliery proprietors had a siding from the London and North Western Railway Company's line, and over the siding a bridge with a headway of eight feet. The railway company negligently pushed a loaded truck eleven feet high against the bridge and broke it down. The jury found that the colliery proprietors as well as the railway company had been negligent in the matter, for they ought to have foreseen what was going to happen, as the loaded truck had been standing about some time; but in spite of this negligence they were held entitled to recover against

Radley's case.

(*p*) Tuff *v.* Warman (1858), 5 C. B. N. S. 573; 27 L. J. C. P. 322.

(*q*) Mayor of Colchester *v.* Brook (1845), 7 Q. B. 339, 376; 15 L. J. Q. B. 59.

the railway company for the damage done to the bridge, as the defendants, by the exercise of ordinary care, might have averted the mischief (*r*).

The donkey case qualification may be put as correctly by saying that a plaintiff is not disentitled by his negligence unless such negligence was *the proximate cause* of the damage.

Davey's case.

In Davey *v.* L. & S. W. Ry. Co. (*s*), which was a level crossing case, the defendants had been to a certain extent negligent, but the plaintiff was held to have been properly nonsuited, because he had been much more negligent, and it was his negligence which had mainly contributed to the accident. "Is it open," said Bowen, L. J., "to any reasonable mind to draw the inference that that accident was caused by anything except the gross negligence of the man, who never looked at a train which was within a few feet of him?"

Contributory negligence is no defence (probably) in criminal law (*t*).

Collisions at sea.

In the case of collisions at sea, where both ships are to blame, the loss is equally apportioned between them (*u*). But in the case of The Bywell Castle (*x*), it was held that where one ship has by wrong manœuvring placed another ship in a position of extreme danger, that other ship will not be held to blame if she has done something wrong, and has not been manœuvred with perfect skill and presence of mind. "You have no right," said James, L. J., "to expect men to be something more than ordinary men."

The Princess Alice catastrophe.

Compulsory pilotage.

It may be mentioned here that, by English law, the owner of a ship is not liable for the negligence of a pilot whom he is *compelled* to employ (*y*). If, however, as in the Suez Canal, the effect of taking the pilot on board is merely to constitute him *adviser*, while the control of the navigation of the ship is left solely with the master, the shipowner will not succeed in sheltering himself behind the compulsory pilotage (*z*).

(*r*) Radley *v.* L. & N. W. Ry. Co. (1876), 1 App. Cas. 754; 46 L. J. Ex. 573; and see Curtin *v.* G. S. & W. Ry. (1887), 22 L. R. Ir. 219.

(*s*) (1883), 12 Q. B. D. 70; 53 L. J. Q. B. 58; but see this case severely criticised in Brown *v.* G. W. Ry. Co. (1885), 52 L. T. 622. See also Smith *v.* S. E. Ry. Co., [1896] 1 Q. B. 178; 65 L. J. Q. B. 219.

(*t*) R. *v.* Swindall (1846), 2 C. & K. 230; 2 Cox, C. C. 141.

(*u*) The Milan (1862), Lush. 388; 31 L. J. Adm. 105; and see The Margaret (1881), 6 P. D. 76; 53 L. J. Adm. 17; The City of Manchester (1880), 5 P. D. 221; 49 L. J. Adm. 80; and The Stoomvaart, &c. *v.* The P. & O. (1882), 7 App. Cas. 795; 52 L. J. Adm. 1.

(*x*) (1879), 4 P. D. 219; 41 L. T. 747; and see The Famenoth (1882), 7 P. D. 207; 48 L. T. 28.

(*y*) 17 & 18 Vict. c. 104, s. 388; and see The Clan Gordon (1882), 7 P. D. 190; 46 L. T. 490.

(*z*) The Guy Mannering (1882),

Choice of dangers.

It is to be observed that the defendant is not excused merely because the plaintiff, knowing of a danger caused by the defendant, voluntarily incurs an alternative danger, *e.g.*, jumps out of a train or coach to escape a collision (*a*). Nor is he excused merely because the plaintiff was doing something illegal (*b*).

"The law with regard to negligence," said Lopes, J., in Brown *v.* G. W. Ry. Co. (*c*), "has somehow or the other got into a lamentable state of confusion."

Supposed doctrine of "identification."

A few words may be said as to the supposed doctrine of *identification*, which for many years was adopted with approval by eminent judges.

You are driving your motor-car, we will say, at your usual furious and improper speed through the streets of a town, and I am going out to dinner in a hansom. My driver, as it turns out,—though, of course, I did not know it when I employed him,—is drunk, and through the joint negligence of him and you, a collision occurs, and I am badly hurt. According to the formerly accepted view, I am so far identified with my drunken driver that *his contributory negligence is mine*, and I shall fail in my action against you (*d*). This theory of *identification* was finally destroyed by the case of Mills *v.* Armstrong (*e*), where a collision having occurred between the steamships "Bushire" and "Bernina" through the fault of the masters of both, a passenger on board the "Bushire" was drowned. The representatives of the deceased brought an action *in personam* against the owners of the "Bernina" for negligence under Lord Campbell's Act, and it was held that the deceased was not identified in respect of the negligence with those navigating the "Bushire," and so the action was maintainable (*f*).

7 P. D. 132; and see The Cachapool (1881), 7 P. D. 217; 46 L. T. 171.

(*a*) Jones *v.* Boyce (1816), 1 Stark. 493; 18 R. R. 812; and see Clayards *v* Dethick (1848), 12 Q. B. 439; Adams *v.* L. & Y. Ry. Co. (1869), L. R. 4 C. P. 742; 38 L. J. C. P. 277.

(*b*) Steele *v.* Buchart (1870), 104 Mass. 59.

(*c*) *Supra*. The case of Wakelin *v.* L. & S. W. Ry. Co. (1886), 12 App. Cas. 41; 56 L. J. Q. B. 229, should be consulted on this subject.

(*d*) See Waite *v.* N. E. Ry. Co. (1859), E. B. & E. 719; 28 L. J. Q. B. 258.

(*e*) (1888), 13 App. Cas. 1; 57 L. J. P. 65; also reported *sub nom.* The Bernina (1887), 12 P. D. 58; 56 L. J. P. 38; overruling Thorogood *v.* Bryan (1849), 8 C. B. 115; 18 L. J. C. P. 336; Armstrong *v.* L. & Y. Ry. Co. (1875), L. R. 10 Ex. 47; 44 L. J. Ex. 89.

(*f*) This case was followed in Mathews *v.* London Street Tramways Co. (1889), 58 L. J. Q. B. 12; 60 L. T. 47, where it was held that the proper direction to the jury is "Was there negligence on the part of the tramway-car driver [the defendants' servant] which caused the accident?" For if so, the fact that someone else was negligent, other than the plaintiff, is immaterial.

Contributory Negligence of Children.

LYNCH *v.* NURDIN. (1841) [113]

[1 Q. B. 29; 10 L. J. Q. B. 73.]

Nurdin was an egg-merchant, and used to send his servant round Soho with a cart to deliver eggs to his customers. One day, when the man was out with the cart as usual, he imprudently left it for half an hour or so standing by itself in Compton Street, drawn up by the side of the pavement. While he was away, some little children began playing about the cart, climbing into it, and having all kinds of games. Amongst them was a boy named Lynch, aged six years. He was in the act of climbing the step with a view to securing a box seat, when another mischievous boy pulled at the horse's bridle. The horse moved on, and Lynch was thrown to the ground and hurt.

The child successfully brought an action for damages against the egg-merchant, it being considered that he was not guilty of contributory negligence, as he had only obeyed a child's natural instinct in playing with the cart.

Child may be guilty of contributory negligence.

It is not to be inferred from this case that a child is incapable of such contributory negligence as disentitles him from recovering. The effect of this and other cases is to establish the rule that *a child is to be judged as a child*, so that we are not to expect the same degree of care from him as from such as are of riper years; but, on the other hand, he must not get into mischief to the extent of doing *what he knows to be naughty:* if he does, he is guilty of disentitling contributory negligence. It is obvious, then, that the law does not consider it "getting into mischief" to the required extent for a child of six to play with carts left unattended in the street. "The decision in Lynch *v.* Nurdin," says Parke, B., in

Lynch *v.* Nurdin

explained in Lygo *v.* Newbold.

Lygo *v.* Newbold (*g*), "proceeded wholly upon the ground that the plaintiff had taken as much care as could be expected from a child of tender years; in short, that the plaintiff was blameless, and consequently that his act did not affect the question." The cases of Abbott *v.* Macfie (*h*), Mangan *v.* Atterton (*i*), and Singleton *v.* Eastern Counties Ry. Co. (*k*), may advantageously be referred to on this subject. In the first of these three cases a child of seven, playing in a Liverpool street, had pulled down on himself the covering of a cellar which the defendant had left leaning against a wall. It was held that he could not recover. In Mangan v. Atterton a Sheffield whitesmith left a machine for crushing oil-cake standing about in the street, without fastening up the handle or taking any other precaution. Forth there came bounding from the school just then the plaintiff, a little boy of four, his brother, aged seven, and some other boys. They instantly collected round the machine; one of them turned the handle; and then, by the direction of his brother, the plaintiff put his fingers in the cogs. The result of this scientific experiment was an action against the owner of the machine. But judgment was given for the defendant, on the double ground, that he had not been negligent, and that the little boy had been (*l*). In the third case a little girl of three was trespassing on a railway. She was sitting on the parapet of a small wooden bridge when a train came up and cut off one or two of her legs. The driver had seen the child, but made no attempt to stop the engine, contenting himself with whistling. It was held that the child could not recover damages against the company,—rather, however, because they had not been negligent at all, than because the plaintiff had been guilty of such contributory negligence as prevented her from availing herself of the defendant's negligence.

Pulling down flap of cellar.

Playing with crushing oil-cake machine.

Singleton's case.

Harrold *v.* Watney.

On the other hand, however, the leading case was followed and approved in the recent case of Harrold *v.* Watney (*m*). The plaintiff, a boy of the age of four years, while passing along a highway, climbed upon a fence situate upon the defendant's adjoining land and separating it from the highway, for the purpose of looking at

(*g*) (1854), 9 Ex. 302; 23 L. J. Ex. 108; and see the American case of Binge *v.* Gardiner, 19 Conn. 507.

(*h*) (1863), 2 H. & C. 744; 33 L. J. Ex. 177; and see Fenna *v.* Clare, [1895] 1 Q. B. 199; 64 L. J. Q. B. 238.

(*i*) (1866), L. R. 1 Ex. 239; 35 L. J. Ex. 161. See Ponting *v.* Noakes, [1894] 2 Q. B. 281; 63 L. J. Q. B. 549.

(*k*) (1859), 7 C. B. N. S. 287.

(*l*) This case, however, will be found severely criticised by Cockburn, C. J., in Clark *v.* Chambers (1878), 3 Q. B. D. 339; 47 L. J. Q. B. 427.

(*m*) [1898] 2 Q. B. 320; 67 L. J. Q. B. 771.

other boys at play on the further side of the fence, and not for the purpose of climbing over it. The fence, which was so defective as to constitute a nuisance, fell upon the plaintiff and injured him. In an action to recover damages for the injury, the Court of Appeal held, that, as the plaintiff in climbing upon the fence was merely indulging the natural instinct of a boy of his age, and doing an act which the defendant ought to have contemplated as likely to be done by children using the highway, the defendant was not entitled to avail himself of the defence that the injury was caused by the plaintiff's own act, and that the plaintiff was consequently entitled to recover.

Contributory negligence of parents.

In the American leading case of Hartfield *v.* Roper (1839), 21 Wend. 615, the defendant, driving a sleigh without bells, had negligently run down a child of two playing about in a street by itself. In an action by the child it was held that *the negligence of its parents in allowing it to wander unattended in a public road* was an answer. But the rule which visits the negligence of the fathers on the children in this way is denied in some of the States of the Union, and has not yet been adopted by the English Courts (*n*).

Position of Plaintiff in regard to Defendant's Negligence.

INDERMAUR *v.* DAMES. (1867) [114]

[L. R. 2 C. P. 311; 36 L. J. C. P. 181.]

Mr. Dames was the owner of a sugar refinery, and employed one Duckham, a gas engineer, to improve his gas-meter. Duckham got his work done by a certain Saturday evening; but it was arranged that he or one of his workmen should come on the following Tuesday to see

(*n*) See, however, the Scotch cases of Davidson *v.* Monkland Ry. Co., 27 Jur. 541; Lumsden *v.* Russell, 28 Jur. 181; Balfour *v.* Baird, 30 Jur. 124.

if the improvement was working satisfactorily. Accordingly on the Tuesday the plaintiff, Indermaur, presented himself as Duckham's representative to look at the gas-meter. Now it happened that on the premises, and level with the floor, there was an unfenced shaft used for the purpose of hauling up bales of sugar. When the shaft was being used for that purpose it was usual and necessary that it should be unfenced; but when not being used there was no particular reason why it should not be fenced. Indermaur fell through this shaft, and brought an action for personal injuries. The sugar people denied their liability to him, contending that he was a mere licensee, and that they were under no particular duty towards him. It was held, however, that he was *not* a mere licensee, as he had come on lawful business, and that as the hole was from its nature unreasonably dangerous to persons not usually employed on the premises, they were liable.

When a person is injured on somebody else's land, and by that somebody's negligence, the question is a very material one—*What was he doing there?*

Trespassers.

1. He may have been a *trespasser*. If so, he cannot, as a rule, recover damages. But there are exceptions. For instance, though a man has a right, as against trespassers, to have a dangerous pit *in the middle of his field*, he has no right to have one *within twenty-five yards of the road* (*o*). See also the Quarry (Fencing) Act, 1887 (50 & 51 Vict. c. 19), which declares an insufficiently fenced quarry, within fifty yards of a highway or place of public resort, to be a nuisance liable to be dealt with summarily in manner provided by the Public Health Act, 1875. Bird *v.* Holbrook (*p*) is a well known authority on this subject. There the defendant, having had some valuable flowers and roots stolen from his garden, which was at some distance from his house, had

Dangerous pit.

Spring-gun.

(*o*) 5 & 6 Will. 4, c. 50, s. 70; and see Barnes *v.* Ward (1850), 9 C. B. 392; 19 L. J. C. P. 195; Hounsell *v.* Smith (1860), 7 C. B. N. S. 731; 29 L. J. C. P. 203.

(*p*) (1828), 4 Bing. 628; 1 M. & P. 607; and see Ilott *v.* Wilkes (1820), 3 B. & Ald. 304; 22 R. R. 400; Jordin *v.* Crump (1841), 8 M. & W. 782; 5 Jur. 1113.

set a spring-gun. The plaintiff climbed a wall, during the daytime, in pursuit of the stray fowl of a friend, and got shot. In spite of the plaintiff being thus a trespasser, it was held that the defendant was liable in damages. "There is no act," said Best, C. J., "which Christianity forbids, that the law will not reach: if it were otherwise, Christianity would not be, as it has always been held to be, part of the law of England. I am, therefore, clearly of opinion, that he who sets spring-guns, without giving notice, is guilty of an inhuman act, and that, if injurious consequences ensue, he is liable to yield redress to the sufferer." Bird *v.* Holbrook.

24 & 25 Vict. c. 100, s. 31 (re-enacting 7 & 8 Geo. 4, c. 18), makes it a misdemeanour to set spring-guns or man-traps, unless it be for the purpose of protecting one's house at night, or of destroying vermin.

But in the case of Murley *v.* Grove (*q*), the defendant, while erecting houses upon land adjoining a new road which had not been dedicated to the public, had dug a trench across the road for the purpose of making drains. The plaintiff's servant, while driving the plaintiff's horses along the road after dark, drove into the trench, there being no lights. It was held that the plaintiff could not recover damages, there being no duty cast on the defendant to protect anyone using the road without permission. Murley *v.* Grove.

2. The plaintiff may have been a *licensee*. Licensees.

In this position are guests. Whenever you go out to dinner, or are stopping with a friend, you are a licensee; and, in respect of the ability to bring an action against your host for his negligence, you are little better than a trespasser. "*A lady with a valuable dress goes out to dinner, and the servant, in handing the soup, negligently spoils her dress; will an action lie against the master?*" (*r*). Going out to dinner.

A licensee can only maintain an action against his licensor when the danger through which he has sustained hurt was of a *latent* character, which the licensor knew of and the licensee did not. Concealed danger.

A gentleman was once leaving a friend's house after paying a call when a loose pane of glass fell from the door as he was pushing it open, and cut him badly; but it was held that he could not recover damages (*s*). "Where a person," said Bramwell, B., "is Southcote *v.* Stanley.

(*q*) (1882), 46 J. P. 360. "*As to the dictum in Gallagher* v. *Humphrey*" ((1862), 6 L. T. 684; 10 W. R. 664), said Cave, J., "*I cannot think that Crompton, J., can have been correctly reported.*"

(*r*) Per Pollock, C. B., in Southcote *v.* Stanley (1856), 1 H. & N. 247; 25 L. J. Ex. 339.

(*s*) Southcote *v.* Stanley, *supra*. The plaintiff appears really to have been staying at the defendant's hotel as a customer; but if so, that fact was not brought out by the pleadings.

in the house of another, either on business or for any other purpose, he has a right to expect that the owner of the house will take reasonable care to protect him from injury; for instance, that he will not allow a trap-door to be open, through which the visitor may fall. But in this case my difficulty is to see that the declaration charges any *act of commission*. If a person asked another to walk in his garden, in which he had placed spring-guns or man-traps, and the latter, not being aware of it, was thereby injured, that would be an act of *commission*. But if a person asked a visitor to sleep at his house, and omitted to see that the sheets were properly aired, whereby the visitor caught cold, he could maintain no action, for there was no act of *commission*, but simply an act of *omission*" (*t*).

Little boy falling into area.

In the case of Burchell *v.* Hickisson (*u*) the plaintiff was a little boy of four, who one day accompanied his sister to the defendant's house, where she was going on business. The girl went up the defendant's steps all right, but the little boy tumbled through a gap in some railings out of repair into the area below. It was held that the action could not be maintained, as the little boy's position could be placed no higher than that he was there lawfully, and was not a trespasser; and that being so, the only duty on the part of the defendant towards him was to take care that there was *no concealed danger*, and of this there was no evidence.

Use of roof for drying linen.

In Ivay *v.* Hedges (*x*) the defendant was the landlord of a house at Wapping, which was let out in apartments to several tenants, each of whom had the privilege of using the roof for the purpose of linen-drying. On an accident happening, it was held that the mere licence so given imposed no duty on the defendant to fence.

Batchelor *v.* Fortescue.

So in Batchelor *v.* Fortescue (*y*), a plaintiff suing under Lord Campbell's Act, was held to be disentitled to complain of the defendant's negligence (even if she could show it, which she could not), because her husband was only a bare licensee at the most when he met with his death. He had been employed to guard some unfinished buildings, and wandered needlessly to a place where the defendant's workmen were carrying on some excavations, when a chain broke, and he was killed. "There was no evidence," said Brett, M. R., "to show that the defendant's workmen had reason to expect the deceased to be at the spot where he met with his death. There was no contract between the defendant and the deceased; the defendant did not undertake with the deceased that

(*t*) The soundness, however, of this distinction between *commission* and *omission* is not beyond question. See Smith on Negligence, p. 31.

(*u*) (1880), 50 L. J. C. P. 101.

(*x*) (1882), 9 Q. B. D. 80.

(*y*) (1883), 11 Q. B. D. 474; 49 L. T. 644.

his servants should not be guilty of negligence; no duty was cast upon the defendant to take care that the deceased should not go to a dangerous place."

Other cases.

The cases of Corby *v.* Hill (1858), 4 C. B. N. S. 556; 27 L. J. C. P. 318; Gautret *v.* Egerton (1867), L. R. 2 C. P. 371; 36 L. J. C. P. 191; Bolch *v.* Smith (1862), 7 H. & N. 736; 31 L. J. Ex. 201; Moffatt *v.* Bateman (1869), L. R. 3 P. C. 115; 22 L. T. 140; Wilkinson *v.* Fairrie (1862), 32 L. J. Ex. 173; 1 H. & C. 633; and the recent decision of the Court of Appeal in Harris *v.* Perry & Co., [1903] 2 K. B. 219; 72 L. J. K. B. 725, may also be referred to on the question as to when a licensee can successfully sue.

On lawful business.

3. The plaintiff may have been *on lawful business.*

And this is the best position of all to be in, the rule being that where a person is upon premises by the invitation or permission of the occupier, on lawful business in which both he and the occupier have an interest, there is a duty towards such person cast upon the occupier to keep the premises in a reasonably secure condition. The plaintiff Indermaur was considered to be in this position; and so, in later cases, where a licensed waterman, who went on board a barge on the Thames to complain of its illegal navigation and get employment if he could (*z*), and a customer at an inn on whom the ceiling of one of the rooms fell (*a*).

Thames waterman.

Guest at inn.

It should be observed, however, that a person cannot succeed in an action of this kind, unless he has used reasonable care on his part for his own safety (*b*).

Elliott *v.* Hall.

In Elliott *v.* Hall (*c*), the defendant, a colliery owner, had consigned coals sold by him to the buyers by rail in a truck rented by him from a waggon company for the purposes of the colliery. Through the negligence of the defendant's servants the truck was allowed to leave the colliery in a defective state, and the consequence was that injury was occasioned to the plaintiff, one of the buyer's servants, who was employed in unloading the coals, and had got into the truck for that purpose. It was held that there was a duty on the part of the defendant towards the plaintiff to exercise reasonable care with regard to the condition of the truck, and that he was liable. "This seems to me," said Grove, J., "a much stronger case than Heaven *v.* Pender (*d*), where it was held that

(*z*) White *v.* France (1877), 2 C. P. D. 308; 46 L. J. C. P. 823.

(*a*) Sandys *v.* Florence (1878), 47 L. J. C. P. 598; but see Walker *v.* Midland Ry. Co. (1886), 55 L. T. 489; 51 J. P. 116.

(*b*) See per Willes, J., in the leading case, L. R. 1 C. P. at p. 288.

(*c*) (1885), 15 Q. B. D. 315; 54 L. J. Q. B. 518.

(*d*) (1883), 11 Q. B. D. 503; 52 L. J. Q. B. 702.

the defendant was liable. Indermaur *v.* Dames, also, does not seem to me so strong a case as this. This is not the mere case of a person lawfully coming into premises for the purposes of business, but the defendant must have known that the plaintiff must necessarily get into the truck for the purpose of unloading the coal. The only case that seems somewhat in the defendant's favour is the case of Collis *v.* Selden (*e*), where it was alleged that the defendant improperly and negligently hung a chandelier in a public-house. . . . . But I do not think that that case is really an authority which bears upon the circumstances of the present case."

Other cases.

The reader should also refer, on this branch of the subject, to Smith *v.* London and St. Katharine Docks Co. (1868), L. R. 3 C. P. 326; 37 L. J. C. P. 217; O'Neil *v.* Everest (1892), 61 L. J. Q. B. 453; 66 L. T. 396; Chapman *v.* Rothwell (1858), E. B. & E. 168; 27 L. J. Q. B. 315; Nicholson *v.* Lanc. and Yorkshire Ry. Co. (1865), 34 L. J. Ex. 84; 3 H. & C. 534; Holmes *v.* N. E. Ry. Co. (1871), L. R. 6 Ex. 123; 40 L. J. Ex. 121; Martin *v.* G. N. Ry. Co. (1855), 24 L. J. C. P. 209; 16 C. B. 179; Burgess *v.* G. W. Ry. Co. (1875), 32 L. T. 76; Wright *v.* L. & N. W. Ry. Co. (1875), 1 Q. B. D. 252; 45 L. J. Q. B. 570; Jewson *v.* Gatti (1885), 1 C. & E. 564; Sandford *v.* Clarke (1888), 21 Q. B. D. 398; 57 L. J. Q. B. 507; and Miller *v.* Hancock, [1893] 2 Q. B. 177; 69 L. T. 214.

As to when the *owner*, and not the *occupier*, of dangerous premises is liable to be sued, see the notes to Todd *v.* Flight, *post*, p. 514.

Actions against Surveyors of Highways, &c.

[115] McKINNON *v.* PENSON. (1854)

[9 Exch. 609; 23 L. J. M. C. 97.]

This was an action against the surveyor of county bridges for the county of Cardigan. One of his bridges was so much out of repair that the plaintiff's carriage was

(*e*) (1868), L. R. 3 C. P. 495; 37 L. J. C. P. 233.

pitched into the river. In suing for the damage thus done, the plaintiff practically admitted that the action could not be maintained at common law, but he relied on a certain Act of Parliament passed in George the Third's reign, which, in his view, gave him a right of action. It was held, however, that the statute did not alter the common law in this respect, and that the action, therefore, could not be maintained.

43 Geo. 3, c. 59.

The Men of Devon.

In 1788, in the case of Russell *v.* The Men of Devon (*f*), it had been held that no action would lie by an individual against the inhabitants of a county for an injury sustained in consequence of a bridge being out of repair. "It is better," said Ashhurst, J., "that an individual should sustain an injury than that the public should suffer an inconvenience."

Young *v.* Davis.

The leading case was followed a few years later in Young *v.* Davis (*g*), which was an action by a foot passenger against some Oxfordshire surveyors of highways for allowing a highway to be out of repair, whereby the plaintiff fell into a hole. "It appears to me," said Pollock, C. B., in that case, "if the plaintiff is to succeed, that it would be enlarging the sphere of legislation very much, and rendering it impossible to get anybody to discharge the duties of surveyor of highways; because we all know what will be the practical result. A surveyor of highways will become a sort of insurer of everyone travelling along the road, and not a single accident will happen without an action being brought." But although a surveyor is not liable for *non*-feasance, he is for *mis*-feasance. Some years ago a vestry ordered their surveyor to get the level of a road raised. The surveyor, accordingly, employed a contractor for the labour part of the job, but made no agreement with him as to fencing or lighting, and reserved to himself the superintendence. The plaintiff driving along the road one night in his dog-cart was upset through not seeing the obstruction, and it was held that the surveyor was liable to him (*h*).

Distinction between misfeasance and non-feasance.

Liability for negli-

A local authority who employ a contractor to do work which

(*f*) (1788), 2 T. R. 667; 1 R. R. 585.

(*g*) (1863), 2 H. & C. 197; 9 L. T. 145.

(*h*) Pendlebury *v.* Greenhalgh (1875), 1 Q. B. D. 36; 45 L. J. Q. B. 3; and see Foreman *v.* Mayor of Canterbury (1871), L. R. 6 Q. B. 214; 40 L. J. Q. B. 138; Hardcastle *v.* Bielby, [1892] 1 Q. B. 709; 61 L. J. M. C. 101; Whyler *v.* Bingham Rural Council, [1901] 1 K. B. 45; 70 L. J. K. B. 207.

gence of contractor.

they are empowered by statute to execute, and which is likely to prove dangerous to others, are bound to see that the work is properly carried out, and are not relieved from liability for injuries caused by the negligent execution of the work by the fact of having employed a contractor (*i*). A local authority employed a contractor to make good a highway. In carrying out the work the contractor negligently left on the road a heap of soil and grass unlighted and unprotected. A person walking on the road after dark fell over the heap and was injured; and the local authority were recently held liable for damages (*k*).

Waterers as well as surveyors.

Moreover, surveyors of highways may be liable as having acted *in some other capacity*. In Blackmore *v.* Vestry of Mile End Old Town (*l*), the plaintiff, whilst walking in Charles Street, Stepney, fell over the iron-flap cover to a water-meter box which was imbedded in the pavement, and had worn smooth by traffic, and broke his leg. "The question to be considered," said Cotton, L. J., "is whether the iron flap was laid down by the defendants as surveyors of highways or in a different capacity and under a different authority, so as to make them liable. It is clear that it was put down by the defendants *as waterers of the highway*," *i.e.*, under sect. 116 of the Metropolitan Local Management Act, 1855 (*m*).

Sewer as well as board authorities.

The fact that a local authority has the control of the sewers as well as of the highways does not render such local authority liable for an accident which is attributable solely to the non-repair of the highway. Thus, in the case of Thompson *v.* Mayor, &c. of Brighton (*n*), the plaintiff was riding along a public road in Brighton, when his horse's foot struck the cover of a man-hole in the middle of the road, which projected about one and a half inches above the surface of the road, and the horse was thrown down and seriously

(*i*) See Hardaker *v.* Idle District Council, [1896] 1 Q. B. 335; 65 L. J. Q. B. 363; and the cases referred to in the judgments in this case.

(*k*) Penny *v.* Wimbledon Urban Council, [1899] 2 Q. B. 72; 68 L. J. Q. B. 704; and see Holliday *v.* National Telephone Co., [1899] 2 Q. B. 392; 68 L. J. Q. B. 302, 1016.

(*l*) (1882), 9 Q. B. D. 451; 51 L. J. Q. B. 496; following White *v.* Hindley Local Board (1875), L. R. 10 Q. B. 219; 44 L. J. Q. B. 148.

(*m*) 18 & 19 Vict. c. 120.

(*n*) [1894] 1 Q. B. 332; 63 L. J. Q. B. 181; see, too, Oliver *v.* Horsham Local Board, *ibid.*; overruling Kent *v.* Worthing Local Board (1882), 10 Q. B. D. 118; 52 L. J. Q. B. 77. See also Cowley *v.* Newmarket Local Board, [1892] A. C. 345; 62 L. J. Q. B. 65; Pictou Municipality *v.* Geldert, [1893] A. C. 524; 63 L. J. P. C. 37; and Sydney Municipality *v.* Bourke, [1895] A. C. 433; 64 L. J. P. C. 140; overruling Hartnall *v.* Ryde Commissioners (1863), 4 B. & S. 361; 33 L. J. Q. B. 39; and explaining Bathurst *v.* Macpherson (1879), 4 App. Cas. 256; 48 L. J. P. C. 61.

injured. The man-hole had been inserted in the road by the corporation of Brighton as the sewer authority. It was a proper cover, and there was no fault in its construction, nor was it at all out of repair. The accident arose from the road not having been kept up to its level by the corporation, who were the road authority. Under these circumstances the corporation were held not liable, as the only breach of duty which could be imputed to them was their omission to repair the road. And, on the other hand, it has been recently decided (*o*), that an action will not lie against a sanitary authority, whose duty it is under the Public Health Act, 1875, to maintain sewers, for damage occasioned by a subsidence of a highway due to the defective condition of a sewer and the road under the highway, unless there is negligence upon the part of the sanitary authority.

A sinking town.

In Burgess *v.* The Northwich Local Board (*p*) the action was by some owners of houses abutting on a highway which was vested in the defendants, a local board acting under 38 & 39 Vict. c. 55 (the Public Health Act, 1875), and having the powers and liabilities of surveyors of highways. The abstraction of salt had caused a subsidence of the ground, and the defendants found it necessary to raise the road. To meet the new level of the road, the plaintiffs raised their houses: and now claimed compensation under sect. 308 of the Act. It was held, however, that as the highway was vested in the defendants, no action of trespass could have been maintained by the plaintiffs even if more materials had been placed on the road than a surveyor of highways could justify, and that the plaintiffs had no right to have the road maintained at the level to which it had accidentally and recently sunk; and that the works of the defendants were not done "in exercise of any of the powers" of the Act within sect. 308, but were done, if not strictly in pursuance of their duty as surveyors of highways, at all events in exercise of such powers as surveyors of highways have; and consequently, that the plaintiffs were not entitled to compensation.

Liability of surveyor for materials supplied.

A surveyor of highways who, in accordance with the provisions of the Highway Act, 1835 (5 & 6 Will. IV. c. 50), contracts for the purchase of materials to be used in the repair of the parish roads, and raises the necessary sum by the levy of a highway rate, is personally and solely liable for payment; and, consequently, his successor in office is not liable therefor, although such materials were, in fact, used in repairing the roads (*q*).

(*o*) Lambert *v.* Lowestoft Corp., [1901] 1 K. B. 590; 70 L. J. K. B. 333.

(*p*) (1880), 6 Q. B. D. 264; 50 L. J. Q. B. 219.

(*q*) Frodingham Iron Co. *v.*

Liability of public bodies generally.

As to the liability of public officers other than surveyors of highways, the following rule from Addison on Torts (*r*) may be quoted:—"Whenever an Act of Parliament imposes upon commissioners, or upon any public body, the duty of maintaining or repairing any public work, and special damage is sustained by a particular individual from the neglect of the public duty, an action for damages is maintainable against such commissioners or public body, unless there are provisions in the statutes creating them for limiting their liability, or the duty of repairing is not absolute; the rule being that, in the absence of something to show a contrary intention, the Legislature intends that the body, the creation of the statute, shall have the same duties, and that its funds shall be rendered subject to the same liabilities, as the general law would impose on a private person doing the same things; and this whether they have or have not funds at their disposal for effecting the repairs; though, if there are no funds, there may be a difficulty in the way of the plaintiff's getting his damages."

Public Authorities Protection Act, 1893.

And on this subject reference should be made to the Public Authorities Protection Act, 1893 (*s*), which provides that "Where any action, prosecution, or other proceeding is commenced against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public duty or authority, or in respect of any alleged neglect or default in the execution of any such Act, duty, or authority, the following provisions shall have effect:

(a) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of, or, in case of a continuance of injury or damage, within six months next after the ceasing thereof (*t*):

(b) Wherever in any such action a judgment is obtained by the defendant, it shall carry costs to be taxed as between solicitor and client (*u*):

Bowser, [1894] 2 Q. B. 791; 64 L. J. Q. B. 12. But see the Highway and Bridges Act, 1891 (54 & 55 Vict. c. 63), and the case of Hertfordshire County Council *v.* Barnet Rural Council, [1902] 2 K. B. 48; 71 L. J. K. B. 610.

(*r*) 7th ed. p. 731.

(*s*) 56 & 57 Vict. c. 61. And as to the discretion of the Court over costs in proceedings under this Act, see Bostock *v.* Ramsey Urban District Council, [1900] 2 Q. B. 616; 69 L. J. Q. B. 945.

(*t*) See Milford Docks Co. *v.* Milford Haven Urban Council (1901), 65 J. P. 483; and Markey *v.* Tolworth Hospital Board, [1900] 2 Q. B. 454; 69 L. J. Q. B. 738.

(*u*) See Chamberlain *v.* Bradford Corp. (1901), 83 L. T. 518; 64 J. P. 806; Ambler *v.* Bradford Corp., [1902] 2 Ch. 585; 71 L. J. Ch. 744; Smith *v.* Northleach [1902] 1 Ch. 197; 71 L. J. Ch. 8;

(c) Where the proceeding is an action for damages, tender of amends before the action was commenced may, in lieu of or in addition to any other plea, be pleaded. If the action was commenced after the tender, or is proceeded with after payment into Court of any money in satisfaction of the plaintiff's claim, and the plaintiff does not recover more than the sum tendered or paid, he shall not recover any costs incurred after the tender or payment, and the defendant shall be entitled to costs, to be taxed as between solicitor and client, as from the time of the tender or payment; but this provision shall not affect costs on any injunction in the action:

(d) If, in the opinion of the Court, the plaintiff has not given the defendant a sufficient opportunity of tendering amends before the commencement of the proceeding the Court may award to the defendant costs to be taxed as between solicitor and client.

Other cases.

The reader is also recommended to refer to the following cases:— Ohrby *v.* Ryde Commissioners (1864), 5 B. & S. 743; 33 L. J. Q. B. 296; Forbes *v.* Lee Conservancy Board (1879), 4 Ex. D. 116; 48 L. J. Ex. 402; Gibson *v.* Mayor of Preston (1870), L. R. 5 Q. B. 218; 39 L. J. Q. B. 131; Parsons *v.* St. Matthew (1867), L. R. 3 C. P. 56; 37 L. J. C. P. 62; Mersey Docks Trustees *v.* Gibbs (1866), L. R. 1 H. L. 93; 35 L. J. Ex. 225; Parnaby *v.* Lancaster Canal Co. (1839), 11 A. & E. 223; 9 L. J. N. S. Ex. 338; Howitt *v.* Nottingham Tramways Co. (1883), 12 Q. B. D. 16; 53 L. J. Q. B. 21; approved in Alldred *v.* West Metropolitan Tramways, [1891] 2 Q. B. 398; 60 L. J. Q. B. 631; and Barnett *v.* Poplar Borough, [1901] 2 K. B. 319; 70 L. J. K. B. 698.

Damage by rioters.

Riot Act, 1886.

A word may be said about the liability of the Hundred or other area to make compensation for damage done by rioters. The statute to be consulted is the Riot (Damages) Act, 1886 (49 & 50 Vict. c. 38), which repealed 7 & 8 Geo. 4, c. 31, and 2 & 3 Will. 4, c. 72, and gave a right to compensation to persons whose buildings are injured or destroyed, or property therein injured, stolen, or destroyed in a riot. In fixing the amount of compensation (which is paid out of the district police rate), regard is had to the conduct of the claimant, whether as respects the precautions taken by him, or as respects his being a party or accessory to the riotous or tumultuous assembly, or as regards any provocation offered to the

Fielden *v.* Morley Corp., [1900] A. C. 133; 69 L. J. Ch. 314; Greenwell *v.* Howell, [1900] 1 Q. B. 535; 69 L. J. Q. B. 461; and Harvey *v.* Truro Rural Council, [1903] 2 Ch. 638; 72 L. J. Ch. 705.

persons assembled or otherwise. It may be noted that churches, chapels, schools, hospitals, public institutions, and public buildings, are within the provisions of the Act. In the case of churches or chapels, the persons to recover the compensation are the church-wardens or chapel-wardens, if any, or, if there are none, the persons having the management of the church or chapel, or the persons in whom the legal estate in the same is vested; and in the case of schools, hospitals, or other public institutions, then the person in whom the legal estate in the same is vested (*x*).

Servant Suing Master for Injury during Service.

[116] PRIESTLEY *v.* FOWLER. (1837)

[3 M. & W. 1; M. & H. 305.]

Fowler was a butcher, and Priestley was his man. It was Priestley's duty to take meat round in a van to the various customers. One day the van broke down, and Priestley's thigh was fractured. The unfortunate butcher-boy now brought an action against his master, but it was held that the action did not lie. "The servant," said the Court, "is not bound to risk his safety in the service of his master, and may, if he thinks fit, decline any service in which he reasonably apprehends injury to himself; and in most of the cases in which danger may be incurred, if not in all, he is just as likely to be acquainted with the probability and extent of it as the master."

(*x*) Sect. 7.

MELLORS *v.* SHAW. (1861) [117]

[30 L. J. Q. B. 333; 1 B. & S. 437.]

This was an action by a miner against his masters, the proprietors of the mine. The sides of the shaft had been left in an unsafe condition, and in consequence some of the "bind" fell on the man's head and injured him severely. The plaintiff was ignorant of the danger under which he was working, but one of the defendants, being the superintendent of the mine, was of course aware of it. On these facts it was held that the action could be maintained.

Notwithstanding the alterations in the law governing a servant's rights against his master when he has sustained personal injuries in the course of the service, first by the Employers' Liability Act, 1880 (*y*), and, secondly, by the Workmen's Compensation Act, 1897 (*z*), the decisions in the leading cases of Priestley *v.* Fowler and Mellors *v.* Shaw are still of an importance, more than merely historical, as they illustrate the common law on the subject.

General rule at common law.

As a rule, a servant cannot at common law bring an action against his master for an injury sustained in the course of the service. All the ordinary risks of the service, including the risk of one of his fellow-servants engaged in a common employment negligently causing him an injury, he is taken to have contemplated at the time of the contract, and to have made allowance for in his wages (*a*).

Exceptions.

Until 1880 there were not many exceptions to this rule. But it was the master's duty to take reasonable precautions to insure the safety of his servants. Thus, if he had omitted to provide competent fellow-servants, or safe and efficient machinery, or if his

(*y*) 43 & 44 Vict. c. 42.
(*z*) 60 & 61 Vict. c. 37.
(*a*) See Wigmore *v.* Jay (1850), 5 Ex. 354; 19 L. J. Ex. 300; Charles *v.* Taylor (1878), 3 C. P. D. 492; 38 L. T. 773; Wilson *v.* Merry (1868), L. R. 1 Sc. App. 326; 19 L. T. 30; Swainson *v.* N. E. Ry. Co. (1878), 3 Ex. D. 341; 47 L. J. Ex. 372; Morgan *v.* Vale of Neath Ry. Co. (1865), L. R. 1 Q. B. 149; 35 L. J. Q. B. 23; Johnson *v.* Lindsay, [1891] A. C. 371; 65 L. T. 97; Cameron *v.* Nystrom, [1893] A. C. 308; 62 L. J. P. C. 85; Hedley *v.* Pinkney Steamship Co., [1894] A. C. 222; 63 L. J. Q. B. 419.

own personal negligence—or even that of a person who might be regarded as a deputy master—had brought about the accident, he was not exempt from liability; unless indeed where, as in the case of a servant being very well aware of the dangerous machinery he was working with, the maxim *volenti non fit injuria* had application (*b*).

Employers' Liability Act, 1880.

The first great modification of the common law on this subject was that effected by the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), which gave "*workmen*" increased rights of action against their masters for personal injuries sustained during the service.

Historical review by Mr. Justice Cave.

"As far back," says Mr. Justice Cave, in his very clear judgment in Griffiths *v.* The Earl of Dudley (*c*), "as the date of the decision in Priestley *v.* Fowler, the law was that the workman could not recover for injuries sustained by him through the negligence of a fellow-servant. In Priestley *v.* Fowler this rule was said to be founded upon an implied contract between master and workman that the master should not be liable. The Courts of common law have always felt hesitation in holding that there could be any right of action otherwise than arising out of contract or tort. They therefore applied the doctrine of implied contract, the effect of which, so far as a man's legal liability was concerned, was much the same as if there had been an express contract. The doctrine was extended by Wilson *v.* Merry (*d*) to injuries caused to a workman by a foreman or person occupying a position of superintendence in the same employment. The Employers' Liability Act was passed to remove the difficulty arising from the decision in Wilson *v.* Merry. The effect of it is that the workman may bring his action in five specified cases, and the employer shall not be able to say in answer that the plaintiff occupied the position of workman in his service, and must therefore be taken to have impliedly contracted not to hold the employer liable. In other words, the legal result of the plaintiff being a workman shall not be that he has impliedly contracted to bear the risks of the employment."

Rights of workmen under Act of 1880.

Let us first proceed to consider the cases in which this Act gave a workman the right to sue his employer.

(*b*) See Murphy *v.* Smith (1865), 19 C. B. N. S. 361; 12 L. T. 605; Ashworth *v.* Stanwix (1861), 30 L. J. Q. B. 183; Webb *v.* Tarrant (1856), 18 C. B. 797; Allen *v.* New Gas Co. (1876), 1 Ex. D. 251; 45 L. J. Ex. 668; Woodley *v.* Met. Ry. Co. (1877), 2 Ex. D. 384; 46 L. J. Ex. 521; Senior *v.* Ward (1859), 1 E. & E. 385; 28 L. J. Q. B. 139.

(*c*) (1882), 9 Q. B. D. 357; 51 L. J. Q. B. 543.

(*d*) (1868), L. R. 1 H. L. Sc. 326; 19 L. T. 30.

The first question is, "Who is a workman?" The 8th section of the Act says—

"The expression 'workman' means a railway servant and any person to whom the Employers and Workmen Act, 1875 (*e*), applies." The guard of a goods train, however, was held not to be a "workman" within the meaning of the Act (*f*). "Workman."

Turning to the Act referred to, we find that—

"The expression 'workman' does not include a domestic or menial servant (*g*), but, save as aforesaid, means any person who, being a labourer, servant in husbandry, journeyman, artificer, handicraftsman, miner, or otherwise engaged in manual labour, whether under the age of twenty-one years or above that age, has entered into or works under a contract with an employer, whether the contract be made before or after the passing of this Act, be express or implied, oral or in writing, and be a contract of service or a contract personally to execute any work or labour."

Sect. 13 provides that the Act "shall not apply to seamen, or to apprentices to the sea service."

The term "workman," as above defined, includes one who has contracted personally to execute manual work, although he is assisted by others whom he selects and pays (*h*). But in Morgan *v.* London General Omnibus Co. (*i*), it was held that the *conductor of an omnibus*, and in Cook *v.* North Metropolitan Tramways Co. (*k*), that the *driver of a tramcar* was not entitled to the benefit of the Act; but the *driver of a cart*, which he helped to load and unload, in the employment of a wharfinger who, for the purposes of his business, is the owner of carts and horses, is a "workman" within the Act (*l*). In Bound *v.* Lawrence, Grantham, J., and Smith, J., differed as to whether a grocer's shop assistant was a "workman"; his duties comprised serving customers in the shop from behind the

(*e*) 38 & 39 Vict. c. 90.

(*f*) Hunt *v.* G. N. Ry. Co., [1891] 1 Q. B. 601; 60 L. J. Q. B. 216.

(*g*) A potman in a public-house is not a "workman," as his duties are substantially of a menial or domestic nature: Pearce *v.* Lansdowne (1893), 62 L. J. Q. B. 441; 69 L. T. 316. And it has been held that a huntsman (Nicoll *v.* Greaves (1864), 33 L. J. C. P. 259; 10 L. T. 531) and a head gardener (Nowlan *v.* Ablett (1835), 2 C. M. & R. 54) are menial servants; but that a husbandman (Lilley *v.* Elwin (1848), 11 Q. B. 742) is not a menial servant.

(*h*) Grainger *v.* Aynsley, and Bromley *v.* Tams (1880), 6 Q. B. D. 182; 50 L. J. M. C. 48.

(*i*) (1884), 13 Q. B. D. 832; 53 L. J. Q. B. 352; and see Jackson *v.* Hill (1884), 13 Q. B. D. 618; 49 J. P. 118; Brown *v.* Butterley Coal Co. (1885), 53 L. T. 964; 50 J. P. 230; Marrow *v.* Flimby Brick Co., [1898] 2 Q. B. 588; 67 L. J. Q. B. 976; Fitzpatrick *v.* Evans, [1902] 1 K. B. 505; 71 L. J. K. B. 302.

(*k*) (1887), 18 Q. B. D. 683; 56 L. J. Q. B. 309.

(*l*) Yarmouth *v.* France (1887), 19 Q. B. D. 647; 57 L. J. Q. B. 7.

counter, writing down their orders, making up parcels of goods, carrying parcels up to eighty-four pounds weight to the cart at the door from the shop, occasionally carrying sides of bacon from the shop door, where hanging, into the shop, each Monday bringing from the cellar bags of sugar, boxes of soap, and sides of bacon, occasionally assisting at the pulley in getting up goods from the cellar, and occasionally wheeling goods in a truck from the warehouse to the shop. But the Court of Appeal held that he was *not* a "workman" within the meaning of the Act, *on the ground that the manual labour was only incidental and accessory to his real and substantial employment*, which was that of a salesman (*m*). It should be observed that the expression used in the above Act is not manual *work*, but manual *labour*, for many occupations involve the former but not the latter, such as telegraph clerks, and all persons engaged in writing (*n*). In a recent Irish case (*o*) a hairdresser was held not to be a "workman" "engaged in manual labour." There has been a difference of opinion among the judges as to whether the doctrine of *ejusdem generis* applies to the expression "otherwise engaged in manual labour" as used in the Act (*p*).

If the workman has been hurt through a preventible defect in the condition of the *ways*, *works*, *machinery or plant* used in his master's business (*q*); or through the negligence of a *superinten-*

(*m*) [1892] 1 Q. B. 226; 61 L. J. M. C. 21.

(*n*) See per Smith, J., in Cook *v.* North Metropolitan Tramways Co., *supra*.

(*o*) Reg. *v.* Louth JJ., [1900] 2 Ir. R. 714.

(*p*) See per Vaughan Williams, J., in Pearce *v.* Lansdowne, *supra*, for the negative; and per Day, J., in Morgan *v.* London General Omnibus Co. (1883), 12 Q. B. D. 201; 53 L. J. Q. B. 352; and per Smith, J., in Cook *v.* North Metropolitan Tramways Co., *supra*, for the affirmative.

(*q*) The Act applies to the case of plant being unfit for the purpose for which it is used, though no part of it is shown to be unsound. See Smith *v.* Baker, [1891] A. C. 325; 60 L. J. Q. B. 683, discussed and followed in Williams *v.* Birmingham Battery Co., [1899] 2 Q. B. 338; 68 L. J. Q. B. 918; and Carter *v.* Clarke (1898), 78 L. T. 76, wher it was held that there was defective "plant" where, owing to the hold of a ship not being properly ventilated, an accumulation of gas occurred which, when the hatch was removed, caused an explosion and injured the plaintiff. In Cripps *v.* Judge (1884), 13 Q. B. D. 583; 53 L. J. Q. B. 517, the plaintiff had been injured by the breaking of a ladder, which may have been good enough for ordinary purposes, but which was insufficient for the particular purpose for which it was being used, and he was held entitled to recover, Heske *v.* Samuelson (1883), 12 Q. B. D. 30; 53 L. J. Q. B. 45, being approved and followed. See also Corcoran *v.* East Surrey Ironworks Co. (1888), 58 L. J. Q. B. 145; Moore *v.* Gimson (1889), 58 L. J. Q. B. 169; Morgan *v.* Hutchins (1890), 59 L. J. Q. B. 197; 38 W. R. 412; Brannigan *v.* Robinson, [1892] 1 Q. B. 344; 61 L. J. Q. B. 202; and Thompson *v.* City Glass Bottle Co., [1902] 1

dent (*r*); or of *any fellow-servant whose orders he had to obey*, and was obeying, at the time of the accident (*s*); or through a fellow-servant's obedience to *stupid rules or instructions* of his master (*t*); or through the negligence of a fellow-servant having the charge or control of any *signal, points, locomotive engines, or train upon a railway* (*u*); in all these cases, the workman (or, if he dies, his

K. B. 233; 71 L. J. K. B. 145. But in McGiffin *v.* Palmer's Shipbuilding Co. (1882), 10 Q. B. D. 5; 52 L. J. Q. B. 25, it was held that "any defect in the condition of the ways" meant a defect of a permanent or quasi-permanent nature, so that an action could not be brought for an injury caused by a piece of iron having been negligently left projecting into the roadway. See also Paley *v.* Garnett (1885), 16 Q. B. D. 52; 34 W. R. 295; Howe *v.* Finch (1886), 17 Q. B. D. 187; 34 W. R. 593; Pegram *v.* Dixon (1886), 55 L. J. Q. B. 447; 51 J. P. 198; Walsh *v.* Whiteley (1888), 21 Q. B. D. 371; 57 L. J. Q. B. 586; Willetts *v.* Watt, [1892] 2 Q. B. 92; 61 L. J. Q. B. 540; Tate *v.* Latham, [1897] 1 Q. B. 502; 66 L. J. Q. B. 349. Defect in the condition of machinery includes the absence of proper means to secure safety in the operation for which the machinery is used: Stanton *v.* Scrutton (1893), 62 L. J. Q. B. 405; 5 R. 244.

(*r*) In Osborne *v.* Jackson (1883), 11 Q. B. D. 619; 48 L. T. 642, it was held that a man might be "in the exercise of superintendence," though at the time voluntarily assisting in manual labour; and Shaffers *v.* General Steam Navigation Co. (1883), 10 Q. B. D. 356; 52 L. J. Q. B. 260, was distinguished on the ground that "the negligent person there had two duties, and was not negligent in his duty of superintendence so as to cause the accident."

(*s*) See Millward *v.* Midland Ry. Co. (1884), 14 Q. B. D. 68; 54 L. J. Q. B. 202, where the plaintiff, a boy of fourteen, employed by a railway company as a van guard, had met with an accident (iron window frames falling on him) through obeying the directions of the driver, and was allowed to recover. But see also Bunker *v.* the same railway company (1882), where another boy who had done what his foreman told him to do was less fortunate in his litigation. "In this particular instance," said the Court, "the plaintiff, being under the age of fifteen, knew that by the rules of the defendant company he was not allowed to drive: he therefore was not bound to obey this order, as the foreman was not a person to compel his obedience to it." (47 L. T. 476; 31 W. R. 231.) See also Kellard *v.* Rooke (1888), 21 Q. B. D. 367; 57 L. J. Q. B. 599; Ray *v.* Wallis (1887), 51 J. P. 519; Howard *v.* Bennett (1888), 58 L. J. Q. B. 129; 60 L. T. 152; Snowden *v.* Baynes (1890), 25 Q. B. D. 193; 59 L. J. Q. B. 325; and Wild *v.* Waygood, [1892] 1 Q. B. 783; 61 L. J. Q. B. 391, where it was held that in order to establish liability under sect. 1, sub-sect. 3, of the Act, it is not necessary that conformity to the order should be the *causa causans* of the injury, though there must be an intimate connection between the negligence, the injury, and the conformity to the order.

(*t*) Rules or bye-laws having the *sanction of a government department* cannot be objected to as improper or defective. Sect. 2, sub-sect. 2; and see Whatley *v.* Halloway (1890), 62 L. T. 639; 54 J. P. 645; Baddeley *v.* Granville (1887), 19 Q. B. D. 423; 56 L. J. Q. B. 501.

(*u*) The term "railway" applies to a temporary railway laid down by a contractor for the purposes of the construction of works: Doughty *v.* Firbank (1883), 10 Q. B. D. 358; 52 L. J. Q. B. 480. But a steam crane, fixed on a trolley and propelled by steam along a set of

representatives) may sue his employer for compensation (*v*). If, however, he was previously aware of the defect or negligence which caused the injury, he must have told his master about it, or he will be out of Court altogether (*x*). The defence based upon the maxim "*volenti non fit injuria*" is not affected by the Employers' Liability Act, 1880 (*y*).

Conditions of suing under Act of 1880.

Written (*z*) notice (which, however, may be excused on good grounds in case of death), *giving the name and address of the person injured, and stating in ordinary language the cause and date of the injury*, must be served (*a*) on the employer within six weeks, and the action must be commenced (in the county court, unless removed (*b*) on the application of either party) within six months of the accident. In the case of death, the action may be commenced any time within twelve months from the time of death (*c*).

rails, is not a "locomotive engine" within the section: Murphy *v.* Wilson (1883), 52 L. J. Q. B. 524; 48 L. T. 788. Trucks upon a siding in a goods yard are "upon a railway," for the sidings form a part of the line: Cox *v.* G. W. Ry. Co. (1882), 9 Q. B. D. 106; 30 W. R. 816. In Gibbs *v.* G. W. Ry. Co. (1884), 12 Q. B. D. 208; 53 L. J. Q. B. 543, it was held that a person who was employed by a railway company to clean, oil, and adjust the points was not a "person having the charge or control" of them. And as to who is a person "having the charge of a train," see McCord *v.* Cammell, [1896] A. C. 57; 65 L. J. Q. B. 202.

(*v*) Sect. 1; and see Robins *v.* Cubitt (1881), 46 L. T. 535.

(*x*) Sect. 2, sub-s. 3; and see Stuart *v.* Evans (1883), 31 W. R. 706; 49 L. T. 138; Weblin *v.* Ballard (1886), 17 Q. B. D. 122; 34 W. R. 455; Griffiths *v.* London and St. Katharine Docks Co. (1884), 13 Q. B. D. 259; Martin *v.* Connah's Quay Alkali Co. (1885), 33 W. R. 216. In the last-mentioned case a waggon was in a defective state, of which the plaintiff was aware, and he used it in such a way as to cause injury to himself when he knew how to use it and might have used it so as not to cause injury to himself. See also McEvoy *v.* Waterford Steamship Co. (1886), 18 L. R. Ir. 159.

(*y*) Thomas *v.* Quartermaine (1887), 18 Q. B. D. 685; 56 L. J. Q. B. 340. As to the meaning of this maxim, the following cases also should be consulted, namely: Yarmouth *v.* France (1887), 18 Q. B. D. 647; 57 L. J. Q. B. 7; Thrussell *v.* Handyside (1888), 20 Q. B. D. 359; 57 L. J. Q. B. 347; Membery *v.* Great Western Ry. Co. (1889), 14 App. Cas. 179; 58 L. J. Q. B. 563; Smith *v.* Baker, [1891] A. C. 325; 60 L. J. Q. B. 683; and Williams *v.* Birmingham Battery Co., [1899] 2 Q. B. 338; 68 L. J. Q. B. 918.

(*z*) Moyle *v.* Jenkins (1881), 8 Q. B. D. 116; 51 L. J. Q. B. 112; and see Keen *v.* Millwall Dock Co. (1882), 8 Q. B. D. 482; 51 L. J. Q. B. 277. The notice may probably be contained in several documents.

(*a*) As to mode of service, see Adams *v.* Nightingale (1882), 72 L. T. 424.

(*b*) An action may be removed into the Superior Court (1) by *certiorari*, (2) by order of the High Court, or (3) by order of the county court where it turns out that the amount is beyond the jurisdiction of the county court. See the case of Munday *v.* Thames Ironworks, &c. Co. (1882), 10 Q. B. D. 59; 47 L. T. 351.

(*c*) Sects. 4 and 7.

Defects and inaccuracies in the notice required by the Act are of no consequence unless the judge before whom the case is tried believes two things, viz., *first*, that the defendant is prejudiced in his defence by the bad notice, and *secondly*, that the defect or inaccuracy was not the result of accident or ignorance, but was for the express purpose of misleading (*d*). Moreover, "the notice is supposed to be given by a person in a humble sphere of life, and not possessed of much knowledge. It is to be written in 'ordinary language,' that is, the party is to use his own untutored language. If it is to be construed with vigorous strictness, the Act will be made nugatory" (*e*). Inaccurate notices.

It has been held that a defence to an action under the Employers' Liability Act, 1880, that the plaintiff has failed to give notice of injury within the six weeks required by section 4, is a special defence under a statute, and a defendant cannot avail himself of such defence (no adjournment being asked for) unless he has filed the five days' notice required by Ord. X. r. 10, of the County Court Rules, 1889 (*f*).

The plaintiff in an action under the Employers' Liability Act, 1880, cannot recover more than "such sum as may be found to be equivalent to the estimated earnings, during the three years preceding the injury, of a person in the same grade employed during those years in" a similar employment and the same district (*g*). The word "earnings" means money or things capable of being turned into money by accurate estimation, such as rent, food and clothes; but it does not include a thing so vague as tuition which an apprentice receives from his master (*h*). In Borlick *v.* Head (*i*), it was held that a plaintiff might give evidence, not only of the wages which he had been earning with the defendants, but also of what he had been getting for overtime with another employer. "Section 3 of the Employers' Liability Act, 1880," said Cave, J., "does not give a measure of damages, but the limit of the maximum damages which may be awarded under that Act." Amount recoverable under Act of 1880.

A contract by a workman not to claim compensation for personal Contracting out of Act.

(*d*) Sect. 7. In Carter *v.* Drysdale (1883), 12 Q. B. D. 91; 32 W. R. 171, the plaintiff's notice did not give the date of the injury, but the omission was held to be of no consequence. See also Beckett *v.* Manchester Corp. (1888), 52 J. P. 346; Previdi *v.* Gatti (1888), 58 L. T. 762; 36 W. R. 670.

(*e*) Per Cave, J., in Stone *v.* Hyde (1882), 9 Q. B. D. 76; 51 L. J. Q. B. 452; and see Clarkson *v.* Musgrave (1882), 9 Q. B. D. 386; 51 L. J. Q. B. 525.

(*f*) Conroy *v.* Peacock, [1897] 2 Q. B. 6; 66 L. J. Q. B. 425.

(*g*) Sect. 3.

(*h*) Noel *v.* Redruth Foundry Co., [1896] 1 Q. B. 453; 65 L. J. Q. B. 330.

(*i*) (1886), 34 W. R. 102; 53 L. T. 909.

injuries under the Act is valid; and, if the injury results in death, destroys the surviving relatives' right of action under Lord Campbell's Act (*k*).

The Workmen's Compensation Acts, 1897 and 1900.

The second great change in the law of employers' liability to servants for injuries sustained in their service was effected by the Workmen's Compensation Act, 1897 (*l*), which came into operation on the 1st of July, 1898; and which was extended for the benefit of workmen in agriculture by the Workmen's Compensation Act, 1900 (*m*).

Liability of certain employers to work-

Sect. 1 provides that (1) "If in any employment (*n*) to which this Act applies, personal injury by accident (*o*) *arising out of and in the course of the employment* (*p*) is caused to a workman, his employer

(*k*) Griffiths *v.* Dudley (1882), 9 Q. B. D. 357; 51 L. J. Q. B. 543.

(*l*) 60 & 61 Vict. c. 37.

(*m*) 63 & 64 Vict. c. 22. To entitle an applicant to compensation under this Act, it is not necessary that the employment of the workman, at the time of the accident in respect of which compensation is sought, should have been "on or in or about" the land of the employer. Smithers *v.* Wallis, [1903] 1 K. B. 200; 72 L. J. K. B. 57.

(*n*) The employments are specified in sect. 7 (1). See *post*, p. 497.

(*o*) The meaning to be given to the word "accident" as used in this Act has now been definitely determined by the House of Lords in the recent case of Fenton *v.* Thorley & Co., Ld., [1903] A. C. 443; which overruled Hensey *v.* White, Lloyd *v.* Sugg, and Walker *v.* Lilleshall Coal Co., [1900] 1 Q. B. 481; 69 L. J. Q. B. 188; and decided that the word "accident" *is used in the popular and ordinary sense, and means a mishap or untoward event not expected or designed.* Thus, a workman, employed to turn the wheel of a machine, by an act of over-exertion ruptured himself, and was held to have suffered an "injury by accident" within the meaning of the Act. So far as any of the earlier cases conflict with this decision they must of course now be taken as overruled; see and compare the following cases, namely, Boardman *v.* Scott, [1902] 1 K. B. 43; 71 L. J. K. B. 3; and Timmins *v.* Leeds Forge Co. (1900), 83 L. T. 120; 16 T. L. R. 521 (ruptures through lifting beam and planks); Dunham *v.* Clare, [1902] 2 K. B. 292; 71 L. J. K. B. 683 (blood-poisoning supervening); and Thompson *v.* Ashington Coal Co. (1901), 84 L. T. 412, where a miner died from blood-poisoning caused by a piece of coal working into his knee as he knelt at work.

(*p*) These words have already given rise to a considerable amount of litigation. In Smith *v.* L. & Y. Ry. Co., [1899] 1 Q. B. 141; 68 L. J. Q. B. 51, a ticket-collector got upon the foot-board of a train after it had started, not for any object of his employment, but for his own pleasure; in getting off he was injured, and it was held that the accident was not one "arising out of" his employment. In Lowe *v.* Pearson, [1899] 1 Q. B. 261; 68 L. J. Q. B. 122, a similar decision was given, where a boy was employed in a pottery; his duty was to make balls of clay and hand them to the woman working at a machine; he was forbidden to interfere in any way with the machinery, and he sustained an injury through attempting to clean the machine while the woman was temporarily absent. A disobedience to orders, however, does not take a workman's action out of the course of the employment unless the order *limits the scope of the employment:* see Whitehead *v.*

shall, subject as hereinafter mentioned, be liable to pay compensation in accordance with the First Schedule to this Act." men for injuries.

(2) "Provided that—

(a) The employer shall not be liable under this Act in respect of any injury which does not disable the workman for a period of at least two weeks from earning full wages at the work at which he was employed (*q*); Disablement must exceed two weeks in duration.

(b) Where the injury was caused by the personal negligence or wilful act of the employer, or of some person for whose act or default the employer is responsible, nothing in this Act shall affect any civil liability of the employer, but in that case the workman may, at his option, either claim compensation under this Act or take the same proceedings as were open to him before the commencement of this Act (*r*); but the employer shall not be liable to pay compensation for injury to a workman by accident arising out of and in the course of the employment both independently of and also under this Act, and shall not be liable to any proceeding independently of this Act, except in case of such personal negligence or wilful act as aforesaid; Injury caused by personal negligence or wilful act.

(c) If it is proved that the injury to a workman is attributable to the *serious and wilful misconduct* of that workman, any Injury attributable to serious

Reader (1901), 70 L. J. K. B. 546; 84 L. T. 514. A workman who is injured in a place not under his employer's control while going to or returning from his work is not within the provisions of the Act: per Smith, L. J., in Holness *v.* Mackay, [1899] 2 Q. B. 319; 68 L. J. Q. B. 724. In Rees *v.* Thomas, [1899] 1 Q. B. 1015; 68 L. J. Q. B. 539, it was held that an accident happening to a workman who, while in his master's employment and on his master's work, does upon an emergency an act in the interests of his master outside the scope of what he was employed to do, and suffers injury while doing the act, is within the provisions of the Act. In Armitage *v.* L. & Y. Ry. Co., [1902] 2 K. B. 178; 71 L. J. K. B. 778, one of a large number of boys employed in the coach-painting department of the works of a railway company, while engaged in his work, received an injury by a blow from a piece of iron thrown in anger by one of two other boys in the same employment at the other, neither of them being at the time engaged upon his work, and the Court of Appeal held that the accident causing the injury did not arise out of the employment of the injured boy within the meaning of the section.

(*q*) See Chandler *v.* Smith, [1899] 2 Q. B. 506; 68 L. J. Q. B. 909.

(*r*) A workman who has exercised his option, and brought his action under the Act of 1880, is not entitled, when he has failed in such action, to take proceedings under the Act of 1897, when he has not applied in that action for compensation to be assessed under sect. 1, sub-sect. 4, of the Act of 1897. See Edwards *v.* Godfrey, [1899] 2 Q. B. 333; 68 L. J. Q. B. 666; and Isaacson *v.* New Grand, Ltd., [1903] 1 K. B. 539; 72 L. J. K. B. 227.

and wilful misconduct of workman.

compensation claimed in respect of that injury shall be disallowed" (*s*).

Arbitration.

Sub-sect. (3) of this section provides for the settlement by arbitration of questions as to whether the employment is one to which the Act applies, and also as to the amount or duration of the compensation (*t*). The procedure in such arbitration is given in the Second Schedule to the Act.

Mistake as to proceedings.

Mistakes as to proceedings are provided for by sub-sect. (4) of the first section (*u*).

Time for taking proceedings and notice of injury.

Sect. 2 deals with the notice of accident and the time for claiming compensation.

The notice of accident (*x*) is to be given as soon as practicable after the happening thereof; the want of, or defect, or inaccuracy in the notice is not to be a bar to the proceedings if it is found that the employer is not prejudiced in his defence, or that the want, defect, or inaccuracy "was occasioned by mistake or other reasonable cause" (*y*).

The *claim* for compensation must be made within six months of the accident. But this does not mean the commencement of judicial proceedings (*z*). An agreement to pay compensation may bar the employer from pleading the time limit (*a*).

Contracting out.

Sect. 3 provides that workmen may contract themselves out of the Act if the contract provides a scheme of compensation which the Registrar of Friendly Societies certifies is on the whole not less favourable to the workmen than the Act.

Sub-contracting.

Sect. 4 provides that the employer shall be liable to the workmen of sub-contractors, unless the work is merely *ancillary or incidental to*, and is no part of, or process in, the trade or business of the employer (*b*).

(*s*) As to what amounts to "serious and wilful misconduct," see MacNicholas *v.* Dawson, [1899] 1 Q. B. 773; 68 L. J. Q. B. 470; Lowe *v.* Pearson, *supra;* Rumboll *v.* Nunnery Colliery Co. (1899), 80 L. T. 42; Rees *v.* Powell Coal Co. (1900), 64 J. P. 164; John *v.* Albion Coal Co. (1901), 18 T. L. R. 27.

(*t*) See Field *v.* Longden, [1902] 1 K. B. 47; 71 L. J. K. B. 120.

(*u*) See Edwards *v.* Godfrey, [1899] 2 Q. B. 333; 68 L. J. Q. B. 666; Cattermole *v.* Atlantic Transport Co., [1902] 1 K. B. 204; 71 L. J. K. B. 173.

(*x*) See Perry *v.* Clements (1901), 17 T. L. R. 525; and Elliott *v.* Liggins, [1902] 2 K. B. 84; 71 L. J. K. B. 483.

(*y*) Osborn *v.* Vickers, [1900] 2 Q. B. 91; 69 L. J. Q. B. 606.

(*z*) Powell *v.* Main Colliery Co., [1900] A. C. 366; 69 L. J. Q. B. 758.

(*a*) Wright *v.* Bagnall, [1900] 2 Q. B. 240; 69 L. J. Q. B. 551. But see Randall *v.* Hill's Dry Dock Co., [1900] 2 Q. B. 245; 69 L. J. Q. B. 554.

(*b*) See Cooper and Crane *v.* Wright, [1902] A. C. 302; 71 L. J. K. B. 642; overruling Cass *v.* Butler, [1900] 1 Q. B. 777; 69 L. J. Q. B. 362. As to the mean-

Sect. 5 provides that the workmen shall, in case of the bankruptcy of the employer, have a first charge on any sum to which the latter is entitled from insurers in respect of his liabilities under the Act (*c*). Bankruptcy of employer.

Sect. 6 provides that when a stranger is liable apart from the Act the workman may proceed either against him or against the employer, and in the latter case the employer is entitled to be indemnified by the stranger (*d*). Recovery of damages from stranger.

Sect. 7 gives the employments to which the Act applies, which are as follows:—"On or in or about a railway (*e*), factory (*f*), mine (*g*), quarry, or engineering work (*h*), or on, in or about any building which exceeds thirty feet in height, and is either being constructed or repaired by means of a scaffolding, or being demolished, or on which machinery driven by steam, water, or other mechanical power, is being used for the purpose of the construction, repair, or demolition thereof (*i*). Application of Act and definitions.

ing of "ancillary or incidental to," see Pearce *v.* L. & S. W. Ry. Co., [1900] 2 Q. B. 100; 69 L. J. Q. B. 683; Wrigley *v.* Bagley, [1901] 1 K. B. 780; 70 L. J. K. B. 538; Knight *v.* Cubitt, [1902] 1 K. B. 31; 71 L. J. K. B. 65; Bush *v.* Hawes, [1902] 1 K. B. 216; 71 L. J. K. B. 68; and see Vamplew *v.* Parkgate Iron Co., [1903] 1 K. B. 851; 72 L. J. K. B. 575; a case of an independent contractor.

(*c*) See Kniveton *v.* Northern Employers Co., [1902] 1 K. B. 880; 71 L. J. K. B. 588.

(*d*) See Appleby *v.* Horseley, [1899] 2 Q. B. 521; 68 L. J. Q. B. 892; Perry *v.* Clements (1901), 17 T. L. R. 525; G. N. Ry. Co. *v.* Whitehead (1902), 18 T. L. R. 816; Thompson *v.* N. E. Engineering Co., [1903] 1 K. B. 428.

(*e*) A refreshment room at a station is not part of a railway: Milner *v.* G. N. Ry. Co., [1900] 1 Q. B. 795; 69 L. J. Q. B. 427.

(*f*) Powell *v.* Brown, [1899] 1 Q. B. 157; 68 L. J. Q. B. 151; Lowth *v.* Ibbotson, [1899] 1 Q. B. 1003; 68 L. J. Q. B. 465; Fenn *v.* Miller, [1900] 1 Q. B. 788; 69 L. J. Q. B. 439; Merrill *v.* Wilson, [1901] 1 K. B. 35; 70 L. J. K. B. 97; Nash *v.* Hollinshead, [1901] 1 K. B. 700; 70 L. J. K. B. 571; Raine *v.* Jobson, [1901] A. C. 404; 70 L. J. K. B. 771; Atkinson *v.* Lumb, [1903] 1 K. B. 861; 72 L. J. K. B. 460.

(*g*) Turnbull *v.* Lambton Collieries Co. (1900), 82 L. T. 589; 16 L. T. 369.

(*h*) Chambers *v.* Whitehaven, [1899] 2 Q. B. 132; 68 L. J. Q. B. 740; Atkinson *v.* Lumb, [1903] 1 K. B. 861; 72 L. J. K. B. 460.

(*i*) Where an accident happens to a workman employed on a building in the course of construction which, although intended when completed to exceed 30 feet in height, does not at the time of the accident exceed that height, the Act does not apply: Billings *v.* Holloway, [1899] 1 Q. B. 70; 68 L. J. Q. B. 16; but see Knight *v.* Cubitt, [1902] 1 K. B. 31; 71 L. J. K. B. 65; see also MacGrath *v.* Neill, [1902] 1 K. B. 211; 71 L. J. K. B. 58. The Act *does* apply to employment on a building in which machinery driven by steam is being used for the purpose of the construction, although the building does not exceed 30 feet in height: Mellor *v.* Tomkinson, [1899] 1 Q. B. 374; 68 L. J. Q. B. 214; the height of a building will generally be measured to the ridge of the roof: Hoddinott *v.* Newton, [1901] A. C. 49; 70 L. J. K. B. 150; whether a structure is a "scaffold-

Workmen of Crown.

The Act applies to workmen of the Crown, except those in the naval or military service. (Sect. 8.)

Scale and conditions of compensation.

The First Schedule to the Act gives the compensation, which is not to exceed £300 in case of death, or £1 per week in case of disablement (*k*).

It has been decided that a County Court judge has no power to entertain an application for a new trial of an arbitration under this Act (*l*).

Factory and Workshop Act, 1901.

Reference should also be made to the provisions of the Factory and Workshop Act, 1901 (1 Edw. 7, c. 22); and to the recent case of Stevens *v.* General Steam Navigation Co. (*m*).

Volunteers.

A person who *volunteers* to assist servants engaged in their work becomes their fellow-servant so far as an action for personal injuries against the employer is concerned (*n*). But the consignee of goods who, with the employer's assent, assists the employer's servants to unload is not a volunteer (*o*).

Servant lent to third party.

If a person lends his servant to another for a particular employment, the servant, for anything done in that particular employment, must be considered as the servant of the man to whom he is lent, although he remains the general servant of the person who lent him (*p*).

The Petrel.

It may be here mentioned that it has been decided that where

ing" within the Act is a mixed question of law and fact: *Ib.*; and see also Dredge *v.* Conway, [1901] 2 K. B. 42; 70 L. J. K. B. 494; Veazey *v.* Chattle (1901), 71 L. J. K. B. 252; 85 L. T. 574; Marshall *v.* Rudeforth, [1902] 2 K. B. 175; 86 L. T. 752; and Elvin *v.* Woodward, [1903] 1 K. B. 838. In Francis *v.* Turner Brothers, [1900] 1 Q. B. 478; 69 L. J. Q. B. 182, it was decided that a workman who is sent by his employers on their business to the *factory of a third party*, and is *there* injured by accident, is not entitled to compensation under the Act; and this case was approved by the House of Lords in Wrigley *v.* Whittaker, [1902] A. C. 299; 71 L. J. K. B. 600.

(*k*) It is outside the scope of this treatise to include even the most important of the many cases which have been reported in order to elucidate or construe this loosely-drawn schedule. The reader is, consequently, referred to one of the many books specially written on the subject.

(*l*) Mountain *v.* Parr, [1899] 1 Q. B. 805; 68 L. J. Q. B. 447.

(*m*) [1903] 1 K. B. 890; 72 L. J. K. B. 417.

(*n*) Degg *v.* Midland Ry. Co. (1857), 1 H. & N. 773; 26 L. J. Ex. 171; and see Abraham *v.* Reynolds (1860), 5 H. & N. 143; 8 W. R. 181; Potter *v.* Faulkner (1861), 1 B. & S. 800; 31 L. J. Q. B. 30.

(*o*) Wright *v.* L. & N. W. Ry. Co. (1876), 1 Q. B. D. 252; 45 L. J. Q. B. 570; and see Holmes *v.* N. E. Ry. Co. (1871), L. R. 6 Ex. 123; 40 L. J. Ex. 121.

(*p*) Donovan *v.* Laing, [1893] 1 Q. B. 629; 63 L. J. Q. B. 25; following Rourke *v.* White Moss Colliery Co. (1877), 2 C. P. D. 205; 46 L. J. C. P. 283; but see Waldock *v.* Winfield, [1901] 2 K. B. 596; 70 L. J. K. B. 925, where these cases are distinguished. See also Union Steamship Co. *v.* Claridge, [1894] A. C. 185; 63 L. J. P. C. 56; and Jones *v.* Scullard, *post*, p. 504.

two vessels came into collision with each other, belonging to the same owners and the same line, and frequenting the same port and river in which the collision occurred, the master and crew of one vessel are not in a common employment with the master and crew of the other vessel (*q*).

Liability of a Contracting Company for Negligence of a Second Company.

THOMAS *v.* RHYMNEY RAILWAY CO. (1871) [118]

[L. R. 6 Q. B. 266; 40 L. J. Q. B. 89.]

Mr. Thomas was a railway passenger from Caerphilly to Cardiff. Midway between these two stations was Llandaff. From Caerphilly to Llandaff the line belonged to the Rhymney Railway Company, and from Llandaff to Cardiff to the Taff Vale Railway Company, the Llandaff Station being also the exclusive property and under the exclusive control of the latter company. The Rhymney Railway Company, however, had running powers over the line from Llandaff to Cardiff, and issued through tickets for the whole journey from Caerphilly to Cardiff. It was one of these tickets that Mr. Thomas took; and his contract therefore was with the Rhymney Railway Company.

All went well till the episcopal city was reached; but at Llandaff station the station-master, a servant of the Taff Vale Company, was guilty of a gross piece of bungling. He allowed the train in which Mr. Thomas was travelling to leave the station only three minutes after an engine and tender of the Taff Vale Company, carrying no tail light,

(*q*) The Petrel, [1893] P. 230; 62 L. J. P. 92.

though the night was very dark, had started on the same line of rails. The consequence was that Mr. Thomas's train ran into the engine and tender, and Mr. Thomas, with other passengers, was much hurt. The question was whether the Rhymney Company were responsible to the plaintiff for the negligence of the Taff Vale Company, and it was held that they *were*, for it was with them that the contract had been made.

Blake's case.

In deciding Thomas *v.* The Rhymney Ry. Co., the judges followed a case of Great Western Ry. Co. *v.* Blake (*r*), holding that it made no difference as to the defendants' liability whether they ran over the other company's line by virtue of running powers conferred on them by *Act of Parliament* or by *arrangement*.

Mr. John on board the steamer.

The principle is not confined to railway companies. A Mr. John wished to go by the defendant's steamboat from Milford Haven to Liverpool. Passengers embarking with that object used first to go on board a hulk in the harbour belonging not to the defendant, but to a Mr. Williams; and thence they would go on board the steamer. Through the negligence (presumably) of Mr. Williams, a certain hatchway on board this hulk was left unprotected, and Mr. John after taking his ticket fell down it (*s*). For this disaster the steamboat proprietor was held responsible, on the principle that he must be taken to have warranted that no part of the road should be defective through negligence.

Contracting company not responsible for collateral operations.

It is to be observed, however, that the contract of a company with the person to whom they have issued a ticket as to accidents happening through other people's negligence extends only to persons connected with carrying the passenger. They are not responsible for collateral operations. In a case some years ago a gentleman took a ticket from the Midland Railway Company to be carried by them on their line from Leeds to Sheffield. The London and North Western Railway Company had running powers over a portion of the line, and through the driver disobeying the Midland signals, one of their trains dashed into the Midland train and injured the traveller bound for Sheffield. He brought his action, but was not successful, because, as he was informed, the judges "cannot connect with the management of the railway something which is the direct effect, not of defective regulations of the company, not of

(*r*) (1862), 7 H. & N. 987; 31 L. J. Ex. 346.

(*s*) John *v.* Bacon (1870), L. R. 5 C. P. 437; 39 L. J. C. P. 365.

any act to which they were parties, not of the neglect of any person whose services they use, but of the neglect of some persons over whom they have no control whatever, and of whose services they do not make use" (*t*).

Effect of conditions against liability.

A railway company may protect itself by an unsigned condition from liability for the loss of goods beyond its own line, the Railway and Canal Traffic Act only having reference to a company's own line. The chief authority for this is a case where a person, having taken a ticket from the South Eastern Railway Company to go from London to Paris, lost his portmanteau between Calais and Paris on the Great Northern of France Railway (*u*). In another case it appeared that a Mr. Burke had taken from the South Eastern Railway Company a return ticket to Paris. On the ticket was a condition (which Mr. Burke never read or knew anything about) that the company would not be responsible for anything happening off their lines. Mr. Burke was injured on some French railway, which his ticket entitled him to travel over, and he went to law with the South Eastern Railway. But it was held that the condition, though they had not taken any sufficient steps to bring it to the plaintiff's notice, absolved them from responsibility (*x*).

Suing the other company.

As to when the injured traveller can sue the company that has been negligent, instead of the company that has given him a ticket, the cases of Foulkes *v.* Metropolitan Ry. Co. (*y*) and Hooper *v.* L. & N. W. Ry. Co. (*z*) may be consulted.

Other cases.

Other cases that may be referred to on the subject-matter of this note are Daniel *v.* Met. Ry. Co. (1871), L. R. 5 H. L. 45; 40 L. J. C. P. 121; Birkett *v.* Whitehaven Junction Ry. Co. (1859), 4 H. & N. 730; 28 L. J. Ex. 348; Buxton *v.* N. E. Ry. Co. (1868), L. R. 3 Q. B. 549; 37 L. J. Q. B. 258; Muschamp *v.* Lancaster and Preston Ry. Co. (1841), 8 M. & W. 421; 5 Jur. 656; Coxon *v.* G. W. Ry. Co. (1860), 5 H. & N. 274; 29 L. J. Ex. 165; Welby *v.* West Cornwall Ry. Co. (1858), 2 H. & N. 703; 27 L. J. Ex. 181; Collins *v.* Brist. & Ex. Ry. Co. (1860), 29 L. J. Ex. 41.

(*t*) Wright *v.* Midland Ry. Co. (1873), L. R. 8 Ex. 137; 42 L. J. Ex. 89.

(*u*) Zunz *v.* S. E. Ry. Co. (1869), L. R. 4 Q. B. 539; 38 L. J. Q. B. 209.

(*x*) Burke *v.* S. E. Ry. Co. (1879), 5 C. P. D. 1; 49 L. J. C. P. 107; and see Watkins *v.* Rymill (1883), 10 Q. B. D. 178; 52 L. J. Q. B. 121; Richardson *v.* Rowntree, [1894] A. C. 217; 63 L. J. Q. B. 283. See also *ante*, p. 318.

(*y*) (1880), 5 C. P. D. 157; 49 L. J. C. P. 361.

(*z*) (1880), 43 L. T. 570; 50 L. J. Q. B. 103.

Person Employing Contractor not Generally Responsible.

[119] QUARMAN *v.* BURNETT. (1840)

[6 M. & W. 499; 4 Jur. 969.]

The defendants were a couple of elderly ladies residing in Lambeth. They kept a carriage of their own, but neither horses nor coachman, and they were in the habit of hiring both from a job-mistress named Mortlock. They generally had the same horses, and always the same coachman, a man named Kemp. They paid him 2*s.* a week, but he received regular wages from Miss Mortlock. The man had a regular Burnett livery, which he always put on when he drove the elderly ladies, and which used to hang up in their hall.

One day Kemp drove the Misses Burnett out as usual, and after depositing them at their door went in himself to leave his livery. He knew the horses well, and trusted them to stand still while he was changing his coat. The horses, however, got frightened at something, and bolted, finally upsetting the plaintiff and severely injuring him.

The question now was whether Kemp was the servant of the Burnetts, so as to make them responsible for what had happened, on the principle *respondeat superior*. Counsel for the plaintiff made great capital out of the livery, the weekly payments, and similar circumstances tending to show that the defendants were the *dominæ pro tempore;* but in the end it was held that they were not liable (*a*).

(*a*) The same point had been previously (in Laugher *v.* Pointer (1826), 5 B. & C. 547; 29 R. R. 319) fully discussed, but, through an equal division, left undecided.

REEDIE *v.* LONDON & NORTH WESTERN RAILWAY CO. (1849) [120]

[4 Exch. 244; 20 L. J. Ex. 65.]

The London & North Western Railway Company, being engaged in constructing a line between Leeds and Dewsbury, agreed with some contractors named Crawshaw that the latter should make two miles of it in a particular part. By the terms of this agreement the company were to have a general right of superintending the progress of the work, and if the contractors employed incompetent workmen, the power to dismiss them. This being the agreement between the company and the contractors, it happened that Mr. Reedie was one day taking a quiet stroll along the Gomersall and Dewsbury turnpike road, and was just passing under one of the company's viaducts in the part of the line which was being done for them by Messrs. Crawshaw & Co., when by the carelessness of one of the contractors' workmen a big stone fell from above and killed him.

This action was brought by the widow under Lord Campbell's Act; but she was unsuccessful, as the workman whose negligence had caused Mr. Reedie's death was considered not to be a servant of the railway company, notwithstanding their power to dismiss him for incompetence.

Person employing contractor not generally liable for contractor's negligence.

To make one person responsible for the negligence of another, it must be shown that the relation of master and servant subsisted between them.

"I apprehend it to be a clear rule," said Willes, J., in 1870, "in ascertaining who is liable for the act of a wrong-doer, that you must look to the wrong-doer himself or to the first person in the ascending line who is the employer and has control over the work.

You cannot go further back and make the employer of that person liable" (*b*).

Jones *v.* Scullard.

The recent case of Jones *v.* Scullard (*c*) should be compared with Quarman *v.* Burnett. The owner of a brougham *and horse*, with its harness, kept them at a livery stable. He had no coachman, but hired a driver from the livery stable keeper at a certain weekly sum. The livery stable keeper paid the driver's wages. The owner of the equipage supplied the driver with a full suit of livery clothes, and there was evidence that the driver had been approved of by the owner. The horse was new to London life, and had only been driven a few times in the brougham by the driver; its peculiarities and characteristics were unknown both to the livery stable keeper and also to the driver. It was held that the inference to be drawn from the circumstances was that the driver was the servant, not of the livery stable keeper, but of the owner of the equipage, who was liable for injuries caused to a third person through the negligence of the driver whilst driving the equipage. In distinguishing this case from Quarman *v.* Burnett, Lord Russell, C. J., said: "In the present case the horse which was being driven was the property of the defendant; and, secondly, not only was it his property, but it was one which he had only recently purchased, and with which, consequently, the driver supplied by the livery stable keeper had but an imperfect acquaintance. *Both these matters are to my mind material.*"

Jones *v.* Liverpool Corporation.

Quarman *v.* Burnett was followed in Jones *v.* The Liverpool Corporation (*d*), where a person named Dean had contracted with the corporation, as urban sanitary authority, to supply by the day a driver and horse for their watering-cart. In an action to recover damages for injuries caused by the negligent conduct of the driver whilst in charge of the cart, it was held that the defendants were not liable.

A contractor exercising an independent employment is not the servant of the person who engages his services, and does not make such person liable for any torts he or his servant may commit (*e*). Nor, again, is a sub-contractor the servant of the contractor who

(*b*) Murray *v.* Currie (1870), L. R. 6 C. P. 24; 40 L. J. C. P. 26.

(*c*) [1893] 2 Q. B. 565; 67 L. J. Q. B. 895. See also Rourke *v.* White Moss Colliery Co. (1877), 2 C. P. D. 205; 46 L. J. C. P. 283; distinguished in Waldock *v.* Winfield, [1901] 2 K. B. 596; 70 L. J. K. B. 925.

(*d*) (1885), 14 Q. B. D. 890; 54 L. J. Q. B. 345. This case was discussed in Donovan *v.* Laing, [1893] 1 Q. B. 629; 63 L. J. Q. B. 25; and see Waldock *v.* Winfield, *supra*.

(*e*) Milligan *v.* Wedge (1840), 12 Ad. & E. 737; 1 Q. B. 714.

has employed him. A railway company entered into a contract with A. to make part of their line. A. contracted with B. to build a bridge in that part of the line, and B. in his turn contracted with C. to erect a scaffold, which was necessary for the building of the bridge. Through the negligence of C.'s workmen somebody tumbled against the scaffold and by-and-by brought an action against B., the builder of the bridge, for personal injuries. But it was held that he ought to have sued C., if anybody (*f*).

Exceptions.

There are, however, some exceptional cases in which a person employing a contractor is liable for the contractor's wrongful acts:—

Interference.

1. *Where the employer personally interferes.*

The proprietor of some newly built houses had his attention drawn by a policeman to the fact that a contractor he had employed to make a drain had left a heap of gravel by the roadside. The proprietor said he would get it removed as soon as possible, and paid a navvy to cart it away. The navvy did not do his work thoroughly, and a person driving home was upset and injured. In an action by this person against the proprietor, Quarman *v.* Burnett was cited for the defence, and it was urged that it was the contractor who was liable. But the proprietor was held liable, on the ground that it did not appear that the contractor had undertaken to remove the gravel, and the proprietor had busied himself about it (*g*).

Illegality.

2. *Where the thing contracted to be done is unlawful.*

A company, without the special powers for that purpose which they ought to have had, employed a contractor to open trenches in the streets of Sheffield. The plaintiff, walking down the street, fell over a heap of stones left there by the contractor, and broke her arm. She succeeded in getting damages out of the company, the distinction being clearly drawn between a contractor being employed to do something lawful and to do something unlawful (*h*).

Injurious consequences not guarded against. Bower *v.* Peate.

3. *Where the thing contracted to be done is perfectly lawful in itself, but injurious consequences must in the natural course of things arise, unless effectual means to prevent them are adopted.*

The defendant, wishing to rebuild his house, employed a contractor to pull it down and erect a new one. The contractor undertook the risk of supporting the plaintiff's house during the work, and to make good any damage and satisfy any claims arising thereon; but the

(*f*) Knight *v.* Fox (1850), 5 Ex. 721; 20 L. J. Ex. 9.

(*g*) Burgess *v.* Gray (1845), 1 C. B. 578; 14 L. J. C. P. 184.

(*h*) Ellis *v.* Sheffield Gas Consumers' Co. (1853), 23 L. J. Q. B. 42; 2 El. & Bl. 767.

defendant was held liable for injury to the plaintiff's house caused by the insufficiency of the means taken by the contractor to support it (*i*).

Hughes *v.* Percival.

The same thing was held in Hughes *v.* Percival (*k*), which was also a case of dangerous building operations. And this principle was again approved and applied in the later case of Black v. Christchurch Finance Co. (*l*).

Black *v.* Christchurch Finance Co.

Holliday *v.* National Telephone Co.

"In my opinion," said Smith, L. J., in the most recent case (*m*) on this subject, "since the decision of the House of Lords in Hughes *v.* Percival, and that of the Privy Council in Black *v.* Christchurch Finance Co., it is very difficult for a person who is engaged in the execution of dangerous works near a highway to avoid liability by saying that he has employed an independent contractor, because it is the duty of a person who is causing such works to be executed to see that they are properly carried out so as not to occasion any damage to persons passing by on the highway."

Statutory obligation to do thing properly.

4. *Where an employer is bound by statute to do a thing efficiently.*

A railway company were authorized by Act of Parliament to make an opening bridge over a navigable river. They employed a contractor, and that gentleman ingeniously made them a bridge which would not open. The plaintiff's vessel was in consequence prevented from navigating the river, and the company were held responsible to him (*n*).

Injuries to workmen.

5. *When the case falls within sect.* 4 *of the Workmen's Compensation Act*, 1897 (*o*).

Other cases.

The following cases may also be referred to on the subject-matter of this note:—Gray *v.* Pullen (1864), 5 B. & S. 970; 34 L. J. Q. B. 265; Glover *v.* East Lond. Waterworks Co. (1868), 17 L. T. 475; 16 W. R. 310; Blake *v.* Thirst (1863), 2 H. & C. 20; 32 L. J. Ex. 188; Bush *v.* Steinman (1799), 1 B. & P. 404; Angus *v.* Dalton (1881), 6 App. Ca. 740; 50 L. J. Q. B. 689, *post*, p. 523.

(*i*) Bower *v.* Peate (1876), 1 Q. B. D. 321; 45 L. J. Q. B. 446.

(*k*) (1883), 8 App. Cas. 443; 52 L. J. Q. B. 719.

(*l*) [1894] A. C. 48; 63 L. J. P. C. 32.

(*m*) Holliday *v.* National Telephone Co., [1899] 2 Q. B. at p. 400; 68 L. J. Q. B. 302, 1016. See also Hardaker *v.* Idle District Council, [1896] 1 Q. B. 335; 65 L. J. Q. B. 363; Penny *v.* Wimbledon Urban Council, [1898] 2 Q. B. 212; 67 L. J. Q. B. 754; affirmed by C. A., [1899] 2 Q. B. 72; 68 L. J. Q. B. 704; and The Snark, [1899] P. 74; 68 L. J. P. 22.

(*n*) Hole *v.* Sittingbourne Ry. Co. (1861), 6 H. & N. 488; 30 L. J. Ex. 81.

(*o*) 60 & 61 Vict. c. 37. See *ante*, p. 494; and see Fitzpatrick *v.* Evans, [1902] 1 K. B. 505; 71 L. J. K. B. 302.

Responsibility of Master for Torts of Servant.

LIMPUS *v.* LONDON GENERAL OMNIBUS CO. [121]
(1862)

[32 L. J. Ex. 34; 1 H. & C. 526.]

"During the journey," say the regulations of the London General Omnibus Company, "he must drive his horses at a steady pace, endeavouring as nearly as possible to work in conformity with the time list. *He must not on any account race with or obstruct another omnibus, or hinder or annoy the driver or conductor thereof in his business, whether such omnibus be one belonging to the company or otherwise.*" In defiance of this excellent rule one of the company's drivers obstructed and upset a rival 'bus belonging to the plaintiff. In an action for the damage so done it was urged for the defendants that the driver was acting contrary to his orders, and therefore outside the scope of his employment. This contention, however, was not successful, for it was held that though the driver had acted recklessly and improperly and in disobedience to his express orders, he had acted, as he thought, for the good of his employers, and sufficiently in the course of his employment to make them liable.

POULTON *v.* LONDON & SOUTH WESTERN RAILWAY CO. (1867) [122]

[L. R. 2 Q. B. 534; 36 L. J. Q. B. 294.]

Mr. Poulton, a horse dealer, took a horse to the Salisbury Agricultural Show, and, after winning any number of prizes, returned with it to Romsey. When he

arrived at his destination he gave up a ticket for himself, and a certificate for his horse. This, however, did not satisfy the station-master, who called upon him to pay 6*s.* 10*d.* for the carriage of the horse, under a mistaken notion that it could not be carried free by that train. Poulton refused to pay this sum, and was consequently arrested by a couple of policemen acting under the station-master's orders, and detained in custody till it was found by telegraphing that Poulton was right and the station-master wrong.

The injured horse dealer now brought an action against the railway company for false imprisonment, but was defeated on a point of law. They successfully answered his claim by saying that, as they themselves would have had no right to apprehend the plaintiff for not paying his horse's fare, so their servant the station-master could have had no implied authority from them to do what he did.

General rule.

In order that a master may be responsible for a tort committed by his servant, the latter must in general have been acting *in the course of his regular employment* (*p*). If while driving me, or driving on my business, my servant negligently injures a person, I am clearly liable. So am I even if the accident occurs while the servant is *temporarily deviating* for a purpose of his own. A contractor gave strict orders to his workmen that they were not to leave their horses, or to go home during the dinner hour. One of them, however, disobeyed these orders, and went home to his dinner a quarter of a mile off, leaving his cart and horse standing unattended outside. They ran away, and injured the plaintiff's railings. The man's master was held responsible, on the ground that the workman *was acting within the general scope of his authority to conduct the horse and cart during the day* (*q*).

Temporary deviation.

Total deviation.

But if the *enterprise is entirely the servant's*—if, for instance, he

(*p*) Beard *v.* London General Omnibus Co., [1900] 2 Q. B. 530; 69 L. J. Q. B. 895, where the *conductor* of an omnibus took upon himself to act as driver, and was held not to be acting therein within the scope of his authority. But see Engelhart *v.* Farrant, [1897] 1 Q. B. 240; 66 L. J. Q. B. 122, *ante*, p. 459.

(*q*) Whatman *v.* Pearson (1868), L. R. 3 C. P. 422; 37 L. J. C. P. 156.

takes his master's carriage without leave for purposes entirely his own—the master is not responsible. A city wine merchant sent a clerk and carman with a horse and cart to deliver wine at Blackheath, and to bring back a quantity of empty bottles to the offices, which were in the Minories. On the homeward journey, after crossing London Bridge, *they should have turned to the right; instead of that they turned to the left, and went in the opposite direction on some private matter of the clerk's.* While thus going quite against their orders, they ran over a child. It was held that the city wine merchant was not responsible (*r*).

It is obvious, however, that the distinction between these two cases is somewhat fine.

The clerk who left the water running.

A case on this subject is Stevens *v.* Woodward (*s*). The plaintiffs were the well-known law publishers carrying on business at 119, Chancery Lane, and the defendants were some solicitors occupying premises over their shop. In the private room of one of the defendants was a lavatory, which the clerks had clear instructions never to use. One afternoon, however, after this gentleman had left, a disobedient clerk, thinking no one would ever know, went into the room to wash his hands. "*I turned the tap,*" the young man afterwards said in evidence, "*and the water did not flow; and then I went out.*" But after the youth had gone out, the water did flow, and flowed so abundantly that a large number of treatises of Messrs. Stevens & Sons down below were spoilt. In an action against the solicitors for the mischief thus inflicted, it was held that the act of the clerk was not within the scope of his authority, or incident to the ordinary duties of his employment, and therefore his masters were not liable. "*The clerk,*" said Lindley, J., "*was a trespasser after his master had left.*"

Duty to take care.

A master, however, is not liable for the negligence of his servant, though committed in the course of his regular employment, unless there is a breach of a duty to take care. An illustration of this is to be found in the case of Neuwith *v.* Over-Darwen Society (*t*). There a committee hired the defendant's concert-hall for an evening

(*r*) Storey *v.* Ashton (1869), L. R. 4 Q. B. 476; 38 L. J. Q. B. 223; and see Wilson *v.* Owens (1885), 16 L. R. Ir. 225. The principle of the Coupé Co. *v.* Maddick, [1891] 2 Q. B. 413; 60 L. J. Q. B. 676, has no analogy, of course, to the subject now under discussion; the point decided in that case being that the bailee for hire of a chattel is responsible to the bailor for damage done to the chattel through negligence of the bailee's servant, though not done in the course of his employment.

(*s*) (1881), 6 Q. B. D. 318; 50 L. J. Q. B. 231. But see this case distinguished in Ruddiman *v.* Smith (1889), 60 L. T. 708; 37 W. R. 528.

(*t*) (1894), 63 L. J. Q. B. 290; 70 L. T. 374.

The violin case.

concert. The memorandum of letting contained no mention of a rehearsal, but a rehearsal was held on the same afternoon without objection. When it had ended, the plaintiff, without request or notice to the hall-keeper, placed his double-bass violin safely in a small room attached to the concert-hall, but in the way of a gas-bracket. The hall-keeper was the defendant's servant, and his duties were to prepare and clean the rooms, open and shut the doors, and attend to the gas. In order to light the gas in the small room the hall-keeper moved the violin in such a way that it fell and was broken. It was held that there had been no such negligence on the part of the hall-keeper in the discharge of his duty towards the defendants as to render them liable to the plaintiff for the damage to his violin. "I am clearly of opinion," said Collins, J., "that there was no duty cast on the defendants. The case is extremely analogous to that of Lethbridge *v.* Phillips (*u*), where A. lent a picture to B., who wished to show it to C., and B., unknown to C., sent it to C.'s house, where it was accidentally injured. It was there held that C. was not responsible for not keeping the picture safely. He was under no contract, and therefore not liable."

Was he servant?

The point, of course, is often taken for the defence in cases of this kind that the person causing the mischief was not the defendant's servant so as to make him liable. An important class of such cases are those in which it is sought to make the proprietor of

Cabby.

a cab liable for the negligence of the driver. Strictly, where the driver has hired the cab from its owner for a fixed sum the relation between the parties is that of bailor and bailee; but it has been held that the effect of the Acts of Parliament regulating cabs is, in the interests of the public, to render the proprietor responsible for the torts of the driver (*x*). Thus, in the case of a cab proprietor who let out a cab and horses by the day, the amount paid for hire being independent of the cabman's earnings, where through the negligence of the latter his fare found himself minus his luggage, the proprietor was held responsible (*y*). And in the later case of Venables *v.* Smith (*z*), the arrangement between the parties being the same as in Powles *v.* Hider, it was held that the proprietor of the cab was responsible to the plaintiff for a drunken driver's

(*u*) (1819), Stark. 544.

(*x*) "Proprietor" is not necessarily confined to the *registered* proprietor, but includes the real and actual owner of the cab: see Gates *v.* Bill, [1902] 2 K. B. 38; 71 L. J. K. B. 702.

(*y*) Powles *v.* Hider (1856), 6 El. & Bl. 207; 25 L. J. Q. B. 331; and see Fowler *v.* Lock (1872), L. R. 7 C. P. 272; 9 C. P. 751; and Abraham *v.* Bullock (1902), 86 L. T. 796; 50 W. R. 626.

(*z*) (1877), 2 Q. B. D. 279; 46 L. J. Q. B. 470; approved in King *v.* London Improved Cab Co. (1889), 23 Q. B. D. 281; 58 L. J. Q. B. 456.

running him down. But it has been held that where the driver hired a cab, *and himself provided the horse and harness*, the owner of the cab was not answerable for the consequences of the driver's negligence (*a*). The legislation regulating locomotives on highways is, in this respect, not analogous to that dealing with hackney carriages (*b*). In Steel *v.* Lester (*c*) the action was brought by the owner of a wharf for injury done to his wharf by a sloop, which through the negligence of her master, a man named Lilee, had broken loose from her moorings. The sloop really belonged to Lester, and he was registered as the owner; but Lilee did not merely act as his hired servant: there was an agreement between them by which Lilee not only had complete control over the vessel, but was entitled to two-thirds of the net profits. In spite of this agreement it was held that Lester must pay for the mending of Steel's wharf. In Lucas *v.* Mason (*d*), the action was by a man who had been turned out of a Church Liberation Association meeting against the chairman, who had said, "*I shall be obliged to bring those men to the front who are making the disturbance. Bring those men to the front.*" It was held that there was not the ordinary relation of master and servant here, and that the chairman was not responsible.

Traction engines.

Master of ship having share of profits.

Noisy church men.

A man is not answerable for the tortious acts of his *servant whom he has lent to another*, committed while in the service of that other. This was held in a case in which some colliery proprietors had agreed with one Whittle that he should do some sinking and excavating for them, and that they should place certain of their servants under his entire control. One of these servants fell asleep when he ought to have been particularly wide awake. It was held that the plaintiff, who had suffered injury in consequence, could not maintain an action against the colliery proprietors, because, though the engineer remained their general servant, yet he was acting as Whittle's servant at the time of the accident (*e*).

Lending servants.

(*a*) King *v.* Spurr (1881), 8 Q. B. D. 104; 51 L. J. Q. B. 105.

(*b*) See Smith *v.* Bailey, [1891] 2 Q. B. 403; 60 L. J. Q. B. 779.

(*c*) (1877), 3 C. P. D. 121; 47 L. J. C. P. 43; and see The Apollo, Little *v.* Port Talbot Co., [1891] A. C. 499; 61 L. J. P. 25, where a dock company were held liable for damages to a ship resulting from the representations and negligence of the harbour-master; but see Wright *v.* Lethbridge (1891), 63 L. T. 572; 6 Asp. M. C. 558.

(*d*) (1875), L. R. 10 Ex. 251; 44 L. J. Ex. 145.

(*e*) Rourke *v.* White Moss Colliery Co. (1877), 2 C. P. D. 205; 46 L. J. C. P. 283; and see Jones *v.* Corporation of Liverpool (1885), 14 Q. B. D. 890; 54 L. J. Q. B. 345; Johnson *v.* Lindsay, [1891] A. C. 371; 61 L. J. Q. B. 90; Cameron *v.* Nystrom, [1893] A. C. 308; 62 L. J. P. C. 85; Donovan *v.* Laing, [1893] 1 Q. B. 629; 63 L. J. Q. B. 25; Waldock *v.* Win-

Wilful and malicious acts of servants.

A master is never responsible for the *wilful and malicious* act of his servant, even while acting in his employment. If, for example, a driver were to lose his temper, and, out of angry feeling, were to drive his master's carriage against another carriage, and so bring about an accident, the master would not be responsible. As Lord Kenyon said, in a well-known case on the subject: "When a servant quits sight of the object for which he is employed, and without having in view his master's orders pursues that which his own malice suggests, he no longer acts in pursuance of the authority given him, and his master will not be liable for such act" (*f*).

Crime of servant.

It is scarcely necessary to say that a man is not generally liable *criminally* for the acts of his servants (*g*). But a master *is* civilly responsible for the tortious act of his servant committed in the course of his employment and for the master's benefit, notwithstanding that the act of the servant is a criminal act. And the master is not released from liability by reason that the servant, having been convicted of the offence, is, by virtue of sect. 45 of 24 & 25 Vict. c. 100, released from all further or other proceedings, civil or criminal, for the same cause (*h*).

A person who puts another in his place to do a class of acts in his absence necessarily leaves him to determine, according to the circumstances which arise, when an act of that class is to be done, and trusts him for the manner in which it is done. Thus, in an action for assault, a railway company was held liable for the violence of a porter who roughly pulled a passenger out of a carriage because he thought that it was the wrong compartment (*i*). And where the superintendent at a railway station with-

field, [1901] 2 K. B. 596; 70 L. J. K. B. 925; and Jones *v.* Scullard, *ante*, p. 504.

(*f*) Macmanus *v.* Crickett (1800), 1 East, 106; 5 R. R. 518.

(*g*) Reg. *v.* Holbrook (1878), 4 Q. B. D. 42; 48 L. J. Q. B. 113; Chisholm *v.* Doulton (1889), 22 Q. B. D. 736; 58 L. J. Q. B. 133; Roberts *v.* Woodward (1890), 25 Q. B. D. 412; 59 L. J. M. C. 129; but see Niven *v.* Greaves (1890), 54 J. P. 548, a case decided under sect. 96 of the Public Health Act, 1875; and St. Helens Tramways Co. *v.* Wood (1892), 60 L. J. M. C. 141; 56 J. P. 70. See also Coppen *v.* Moore, [1898] 2 Q. B. 306; 67 L. J. Q. B. 689, a case under the Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28), s. 2 (1) and (2); and Collman *v.* Mills, [1897] 1 Q. B. 396; 66 L. J. Q. B. 170, under the Slaughter-houses, &c. Act, 1874 (37 & 38 Vict. c. 67); and see the Sale of Food and Drugs Acts, 1875 (38 & 39 Vict. c. 63), 1879 (42 & 43 Vict. c. 30), and 1899 (62 & 63 Vict. c. 51), and the numerous cases decided under these Acts, the latest of which is Parker *v.* Alder, [1899] 1 Q. B. 20; 68 L. J. Q. B. 7.

(*h*) Dyer *v.* Munday, [1895] 1 Q. B. 742; 64 L. J. Q. B. 448.

(*i*) Bayley *v.* Manchester, Sheffield and Lincolnshire Ry. Co. (1873), L. R. 7 C. P. 415; 8 C. P. 148; 42 L. J. C. P. 78. See also Seymour *v.* Greenwood (1861), 7 H. & N. 355; 30 L. J. Ex. 327; and Dyer *v.* Munday, *supra*.

out reasonable cause gave a passenger into custody for travelling without a ticket, and *an Act of Parliament authorized this* to be done in the case of passengers travelling without having paid their fare, the company was held liable (*k*). But it is not within the ordinary scope of a bank manager's authority to order the arrest or prosecution of offenders (*l*), nor has the booking-clerk of a railway company authority to give into custody a person whom he suspects of attempting to rob the till, after the attempt has ceased (*m*). Similarly a railway porter left in charge of a station does not render the company liable in an action for false imprisonment when he gives an innocent person into custody on the charge of stealing the company's property (*n*). "There seems no ground for saying," remarked Keating, J., "that what was done was in the ordinary course of the business of the company, nor that it was for their benefit, except in so far as it is for the benefit of all the Queen's subjects that a criminal should be convicted." Reference should be made on this subject to the recent case of Knight *v.* North Metropolitan Tramways Co. (*o*). The plaintiff was travelling in one of the defendant company's tramcars, and tendered a sixpence in payment of the fare and received fourpence change. Shortly afterwards the conductor alleged it was counterfeit, and, on the plaintiff refusing to give another, the conductor gave him in charge. An inspector of the company, who happened to be passing, sent the conductor down to charge the plaintiff, and went on with the tramcar. The next morning the magistrate dismissed the charge, the sixpence turning out to be a good one. Another inspector of the company was present in Court during the proceedings. The plaintiff thereupon brought an action against the tramway company for malicious prosecution and false imprisonment; but the Court held that there was no evidence to show that the conductor acted within the scope of his authority express or implied, or that the defendant company ratified his proceedings. "This case," said Bruce, J., "does not resemble the numerous

Knight *v.* North Metropolitan Tramways Co.

(*k*) Goff *v.* Great Northern Ry. Co. (1861), 3 E. & E. 672; 30 L. J. Q. B. 148. See also Moore *v.* Metropolitan Ry. Co. (1872), L. R. 8 Q. B. 36; 42 L. J. Q. B. 23; Edwards *v.* Midland Ry. Co. (1880), 6 Q. B. D. 287; 50 L. J. Q. B. 281; Lowe *v.* Great Northern Ry. Co. (1893), 62 L. J. Q. B. 524; 5 R. 535.

(*l*) Bank of New South Wales *v.* Owston (1879), 4 App. Cas. 270; 48 L. J. P. C. 25.

(*m*) Allen *v.* London and South Western Ry. Co. (1870), L. R. 6 Q. B. 65; 40 L. J. Q. B. 55; and see Abrahams *v.* Deakin, [1891] 1 Q. B. 516; 60 L. J. Q. B. 238.

(*n*) Edwards *v.* London and North Western Ry. Co. (1870), L. R. 5 C. P. 445; 39 L. J. C. P. 241.

(*o*) [1898] 78 L. T. 227.

class of cases of which Goff *v.* Great Northern Ry. Co. (*p*) is an example, in which persons have been given into custody by the officials of railway companies for travelling on a railway without having paid the fare and with intent to defraud. In these cases power is given by statute 8 & 9 Vict. c. 20, sects. 103 and 104, to all officers and servants on behalf of the company to apprehend such persons. . . . In the present case there is nothing to show that any officer of the company had under any circumstances authority from the company to give passengers into custody for passing counterfeit coin. The case of Charleston *v.* The London Tramways Co. (4 T. L. R. 629) seems to be conclusive on this point. Had the charge against the plaintiff been that he had attempted to avoid payment of his fare or any charge of a like nature within the 51st section of the Tramways Act, 1870 (*q*), a very different question would have arisen, and the case would have come within the principle of Goff *v.* Great Northern Ry. Co. See Rayson *v.* South London Tramways Co., [1893] 2 Q. B. 304; 62 L. J. Q. B. 593." In Richards *v.* The West Middlesex Waterworks Co. (*r*), it was held that a bailiff who committed an unnecessary assault in levying a distress was not acting within the scope of his authority, and did not make his employers responsible. See also Furlong *v.* South London Tramways Co. (1884), 1 C. & E. 316; 48 J. P. 329.

Ruinous Premises.

[123] **TODD** *v.* **FLIGHT.** (1860)

[9 C. B. N. S. 377; 30 L. J. C. P. 21.]

Flight bought a shaky old house next door to the plaintiff's chapel, and let it to a tenant. By-and-by the house tumbled down on the chapel, and did it the mischief in respect of which this action was brought. Flight's answer to the claim was—"The occupier, my tenant, is responsible;

(*p*) (1861), 3 E. & E. 672; 30 L. J. Q. B. 148.
(*q*) 33 & 34 Vict. c. 78.
(*r*) (1885), 15 Q. B. D. 660; 54 L. J. Q. B. 551.

not I, the innocent reversioner." But it was held that, as Flight had let the house when he knew the chimneys to be in a very dangerous condition, and as the building had fallen by the laws of nature, and not through the default of the tenant, it was he who must pay.

Occupier generally liable.

The general rule is that *the occupier*, not the landlord, is responsible for any injury happening to a third person through premises being out of repair. Thus, in Tarry *v.* Ashton (*s*), it was held that an occupier in the Strand who had a lamp projecting several feet across the pavement was bound to keep it in repair so as not to be dangerous to persons passing along the street, and was liable for damage done to an old woman on whom it fell through want of repair, notwithstanding that he had employed a competent contractor to put it right. "There are only two ways," said the Court in a case (*t*) where an insufficiently fastened chimney-pot got dislodged by a high wind and injured somebody, "in which landlords or owners can be made liable in the case of an injury to a stranger by the defective repair of premises let to a tenant, *the occupier, and the occupier alone, being* primâ facie *liable:* first, in the case of a *contract by the landlord to do the repairs*, where the tenant can sue him for not repairing; secondly, in the case of a *misfeasance* by the landlord, as, for instance, where he lets premises in a ruinous condition."

The rotten lamp in the Strand.

Landlord liable in only two cases.

Miller *v.* Hancock.

Reference may be made to the case of Miller *v.* Hancock (*u*). The defendant was the owner of a building in the City, the different floors of which were let by him separately as chambers or offices, the staircase, by which access to them was obtained, remaining in the possession and control of the defendant. The plaintiff, who had in the course of business called on the tenants of one of the floors, fell, while coming down the staircase, through the worn and defective condition of one of the stairs, and sustained personal injuries. Upon these facts the Court of Appeal held, that there was by necessary implication an agreement by the defendant with his tenants to keep the staircase in repair, and, inasmuch as the defendant must have known and contemplated that it would be used by persons having business with them, there was a duty on

(*s*) (1876), 1 Q. B. D. 314; 45 L. J. Q. B. 260.

(*t*) Nelson *v.* Liverpool Brewery Co. (1877), 2 C. P. D. 311; 46 L. J. C. P. 675.

(*u*) [1893] 2 Q. B. 177; 69 L. T. 214; and see Smith *v.* London and St. Katharine Docks Co. (1868), L. R. 3 C. P. 326; 37 L. J. C. P. 217; and Blake *v.* Woolf, [1898] 2 Q. B. 426; 67 L. J. Q. B. 813.

his part towards such persons to keep it in a reasonably safe condition.

Letting land with nuisance.

But a landlord is liable who lets land with a continuous nuisance upon it which he takes no steps to remove: *e.g.*, with an obstructive wall (*x*), or a stinking privy (*y*). He is not liable, however, for a

Nuisance created by occupier.

nuisance occasioned by the particular use to which the occupiers choose to put the premises (*z*), unless, indeed, the nuisance arises naturally and of necessity from the use of the premises as contemplated by the demise (*a*). Even when a nuisance arising from a defect in the premises does not exist at the commencement of a tenancy, a landlord may become liable for its continuance by allowing the tenant to continue in possession beyond the original

Bowen *v.* Anderson.

term. In the recent case of Bowen *v.* Anderson (*b*), the plaintiff was injured through a defect in the condition of a coal-plate in the pavement in front of a house let by the defendant on a weekly tenancy. The evidence showed that the defect had existed for some months before the accident, but was conflicting as to whether the accident was owing to the neglect of the tenant to secure the plate properly, or to the defective state of the flagstone, or to the presence of clay, which prevented the plate from fitting. The county court judge directed a verdict for the plaintiff, the amount of damages being agreed. But on appeal a new trial was ordered, it being held that a weekly tenancy does not determine without notice at the end of each week, but some notice is required to determine such a tenancy, that the continuance of the tenant's occupation on the expiration of each week did not render the defendants liable for defects then existing, as if there had been a re-letting, and that it was a question for the jury whether the injury was caused by the negligence of the tenant, or by a structural defect existing at the date of the original letting, for which the defendant would be liable.

Sandford *v.* Clarke.

In delivering judgment, Wills, J., said: "I think the decision in Sandford *v.* Clarke (*c*) was right, but I think the grounds on which the judgment was based were not right. It is my own decision, and therefore I feel the more free to criticise it. I think we were mistaken in holding that a weekly tenancy comes to an end at the end of each week. The attention of the Court was not called to the

(*x*) Rosewell *v.* Prior (1701), 2 Salk. 439; 12 Mod. 635.

(*y*) R. *v.* Pedly (1834), 1 A. & E. 822; 3 N. & M. 627.

(*z*) Rich *v.* Basterfield (1847), 4 C. B. 783; 16 L. J. C. P. 273.

(*a*) Harris *v.* James (1876), 35 L. T. 240; 45 L. J. Q. B. 545.

(*b*) [1894] 1 Q. B. 164; 42 W. R. 236.

(*c*) (1888), 21 Q. B. D. 398; 57 L. J. Q. B. 507. See Woodfall's Landlord and Tenant, p. 776 (15th ed.); and Roscoe's Nisi Prius, p. 1009 (16th ed.).

case of Jones *v.* Mills (*d*), and that decision was overlooked in giving judgment." In Gandy *v.* Jubber (*e*), the tenancy was from year to year, and the Court of Queen's Bench held that the landlord might have re-entered at the end of each year, and that he was therefore liable for the consequences resulting from an accident caused by a grating in front of the house having been for some years in a defective state. In the Exchequer Chamber the decision was overruled, on the ground that it proceeded upon a misapprehension of the peculiar relations existing between the landlord and tenant in the case of a tenancy from year to year. Such a tenancy requires something to be done between the landlord and tenant in order to determine the tenancy.

Gandy *v.* Jubber.

In the absence of special circumstances, it is the duty of the tenant, and not of the landlord, to see that fences are in repair, so that cattle cannot stray on the land of others (*f*).

Liability of tenant for defective fences.

Where the servant of the defendant causes the nuisance in the course of his employment, the defendant may be liable, though neither occupier nor landlord; *e.g.*, where the carman of a coal merchant delivering coals at a customer's removed an iron plate in the footway without taking proper precautions against accidents (*g*).

Whiteley *v.* Pepper.

The following cases may also be consulted:—Pretty *v.* Bickmore (1873), L. R. 8 C. P. 401; 28 L. T. 704; Gwinnell *v.* Eamer (1875), L. R. 10 C. P. 658; 32 L. T. 835; Payne *v.* Rogers (1794), 2 H. Bl. 349; 3 R. R. 415; Russell *v.* Shenton (1842), 3 Q. B. 449; 2 G. & D. 573; White *v.* Jameson (1874), L. R. 18 Eq. 303; 22 W. R. 761; Bishop *v.* Bedford Charity (1859), 1 E. & E. 697; 29 L. J. Q. B. 53.

Other cases.

(*d*) (1861), 10 C. B. N. S. 788; 31 L. J. C. P. 56.

(*e*) (1864), 5 B. & S. 78, 485; 33 L. J. Q. B. 151; and undelivered judgment *contra* in Ex. Ch. 9 B. & S. 15.

(*f*) Cheetham *v.* Hampson (1791), 4 T. R. 318; 2 R. R. 397.

(*g*) Whiteley *v.* Pepper (1877), 2 Q. B. D. 276; 46 L. J. Q. B. 436.

Damage from Sparks of Railway Engines.

[124] **VAUGHAN** *v.* **TAFF VALE RAILWAY CO.** (1860)

[5 H. & N. 679; 29 L. J. Ex. 247.]

Mr. Vaughan was the proprietor of a plantation adjoining the embankment of the Taff Vale Railway Company. One day this plantation was discovered to be on fire, and eight acres of it were burnt. It was not disputed that it had taken fire from a spark from one of the defendants' engines, but they contended, and it was decided, that they were not responsible, as they *were authorized to use such engines, and had adopted every precaution that science could suggest to prevent injury* (*h*).

Train frightening horses.

In the earlier case of R. *v.* Pease (*i*), it had been decided that a railway company authorized by statute to use locomotive engines are not indictable for a nuisance if their engines frighten the horses of persons travelling along a highway running parallel to the line. "The Legislature," said the Court, "must be presumed to have known that the railroad would be adjacent for a mile to the public highway, and consequently that travellers upon the highway would be in all probability incommoded by the passage of locomotive engines along the railroad. That being presumed, there is nothing unreasonable or inconsistent in supposing that the Legislature intended that the part of the public which should use the highway should sustain some inconvenience for the sake of the greater good to be obtained by other parts of the public in the more speedy travelling and conveyance of merchandise along the new railroad."

The vibration case.

The leading case and the one just referred to were both approved in the great case of the Hammersmith Railway Company *v.* Brand (*k*),

(*h*) This case was recently followed by the Privy Council in Canadian Pacific Ry. *v.* Roy, [1902] A. C. 220; 71 L. J. P. C. 51.

(*i*) (1832), 4 B. & Ad. 30; 1 N. & M. 690; and see Lea Conservancy Board *v.* Mayor of Hertford and others (1884), 1 C. & E. 299; 48 J. P. 628.

(*k*) (1869), L. R. 4 H. L. 171; 38 L. J. Q. B. 265. See also Harrison *v.* Southwark and Vauxhall Water Co., [1891] 2 Ch. 409; 60 L. J. Ch. 630.

where it was held that the Lands Clauses Consolidation Act, and the Railway Clauses Consolidation Act, do not contain any provisions under which a person, whose land has not been taken for the purposes of a railway, can recover statutory compensation from the railway company in respect of damage or annoyance arising from vibration occasioned (without negligence) by the passing of trains, after the railway is brought into use, even though the value of the property has been actually depreciated thereby.

Truman's case.

The case of the London, Brighton and South Coast Railway Company *v.* Truman (*l*), is to the same effect. The occupiers of houses near the East Croydon Station were very much annoyed by the noise made by cattle and drovers brought on to the land of the railway company, but it was held that the company were protected by their Act against legal proceedings for a nuisance. The Vaughan, Pease, and Brand cases were followed, and the Hill case was distinguished. "I think it is enough," said Lord Halsbury, L. C., referring to the last-mentioned case, "in discussing that case to say that the ground of the decision was one which distinguished it from the present by reason of the very nature of the enactment which was then under discussion. The Railway Acts, treated as a well-known and recognized class of legislation, were expressly and carefully distinguished from the permissive character of the legislation which your Lordships were then construing. Broadly stated, the distinction taken amounted to this, that a small-pox hospital might be built and maintained if it could be done without creating a nuisance; whereas the Railway Acts were assumed to establish the proposition that the railway might be made and used whether a nuisance were created or not."

Negligence.

On the other hand, if a company have been guilty of negligence —indeed, if they have not adopted the latest appliances to prevent danger—their statutory authority will not help them (*m*). An important case on this point is Smith *v.* The L. & S. W. Ry. Co. (*n*). In the middle of a hot summer, some workmen of the company,

(*l*) (1885), 11 App. Cas. 45; 55 L. J. Ch. 354; National Telephone Co. *v.* Baker, [1893] 2 Ch. 186; 62 L. J. Ch. 699; but see R. *v.* Essex (1889), 14 App. Cas. 153; 58 L. J. Q. B. 594; Gas Light Co. *v.* St. Mary Abbotts (1885), 15 Q. B. D. 1; 54 L. J. Q. B. 414.

(*m*) Fremantle *v.* L. & N. W. Ry. Co. (1861), 10 C. B. N. S. 89; 31 L. J. C. P. 12; and see Geddis *v.* Bann Reservoir (1878), 3 App. Cas. 430; Brine *v.* G. W. Ry. Co. (1862), 31 L. J. Q. B. 101; 2 B. & S. 402; Piggot *v.* Eastern Counties Ry. Co. (1846), 3 C. B. 229; 15 L. J. C. P. 235; Gibson *v.* S. E. Ry. Co. (1858), 1 F. & F. 23; Longman *v.* Grand Junction Canal Co. (1863), 3 F. & F. 736; and Dimmock *v.* North Staffordshire Ry. Co. (1866), 4 F. & F. 1058.

(*n*) (1870), L. R. 6 C. P. 14; 40 L. J. C. P. 21.

who had been cutting the grass and trimming the hedges by the side of the line, left the trimmings lying about in heaps, instead of carting them all away. After the heaps had been there a fortnight, they were one day—presumably from the sparks of an engine of the company that had just gone by—discovered to be on fire. The fire was fanned by a high wind, and finally burnt down the cottage of Smith, two hundred yards off. It was held that the defendants, though their engines were of the best possible construction, were responsible for the damage thus done. So it has been held to be actionable negligence to blow off steam at a level crossing (*o*).

No statutory authority.

Moreover, if persons are not authorized by statute to run locomotive engines, and yet do so, they are liable for injuries resulting, though negligence is expressly negatived (*p*). This is on the principle of Fletcher *v.* Rylands (*q*), viz., that when a man brings or uses a thing of a dangerous nature on his own land, he must keep it in at his own peril.

Statutory authority, but common law rights reserved. Small-pox hospitals. Traction engines.

Further, where by statute a thing is *permitted, not directed*, to be done, it is not in general to be inferred that the right of action is taken away for a nuisance caused by the doing of such thing, even if such nuisance is not due to any negligence in the manner of the doing it. In virtue of this principle, some property owners at Hampstead a few years ago managed to get rid of a small-pox hospital from their neighbourhood (*r*); and a farmer down in Wiltshire got damages out of the owner of a traction engine, the sparks from which had set on fire one of his stacks. "It is hardly contended," said Baggallay, L. J., "that the defendant is not liable at common law; but section 5 of the Locomotive Act, 1865, is relied upon as affording a defence. But I think it quite clear that the right at common law is preserved by section 12" (*s*).

Rapier *v.* London Tramways Co.

Another good illustration of this principle is Rapier *v.* London Tramways Co. (*t*). The defendants were a tramway company, who

(*o*) Manchester South Junction Ry. Co. *v.* Fullarton (1863), 14 C. B. N. S. 54; 11 W. R. 754.

(*p*) Jones *v.* Festiniog Ry. Co. (1868), L. R. 3 Q. B. 733; 37 L. J. Q. B. 214.

(*q*) See *ante*, p. 449.

(*r*) Metr. Asylum District *v.* Hill (1881), 6 App. Cas. 193; 50 L. J. Q. B. 353; approved in Canadian Pacific Ry. Co. *v.* Parke, [1889] A. C. 535; and see Att.-Gen. *v.* Manchester Corp., [1893] 2 Ch. 87; 62 L. J. Ch. 459; Vernon *v.* Vestry of St. James (1880), 16 Ch. D. 449; 50 L. J. Ch. 81; Bendelow *v.* Wortley Union (1887), 57 L. J. Ch. 762; 57 L. T. 849.

(*s*) Powell *v.* Fall (1883), 5 Q. B. D. 597; 49 L. J. Q. B. 428.

(*t*) [1893] 2 Ch. 588; 63 L. J. Ch. 36; and see Meux's Brewery Co. *v.* City of London Electric Lighting Co., and Shelfer *v.* The same, [1895] 1 Ch. 287; 64 L. J. Ch. 216, where it was held that

were empowered by their Act to lay down certain tramway lines "with all proper works and conveniences connected therewith." The Act gave no compulsory powers for taking lands, and made no special mention of building stables. The defendants constructed the lines, and bought some land near the plaintiff's premises, and erected thereon a large block of stables for the horses employed in drawing the cars, resulting in offensive smells being occasioned and constituting a nuisance to the plaintiff. The Court of Appeal (affirming Kekewich, J.) held, that although horses were necessary for the working of the tramways, the defendants were not justified by their statutory powers in using the stables so as to be a nuisance to their neighbours, and that, therefore, the fact that they had taken all reasonable care to prevent a nuisance was no legal excuse.

Other cases.

The following cases may also be referred to as to injuries resulting from the exercise of statutory powers:—Cator *v.* Lewisham Board of Works (1864), 5 B. & S. 115; 34 L. J. Q. B. 74; Lawrence *v.* G. N. Ry. Co. (1851), 16 Q. B. 643; 20 L. J. Q. B. 293; Fleming *v.* Manchester Corporation (1881), 44 L. T. 517; 45 J. P. 423; Brownlow *v.* Metr. Board (1864), 33 L. J. C. P. 233; 16 C. B. N. S. 546; Manley *v.* St. Helens, &c. Co. (1858), 2 H. & N. 840; 27 L. J. Ex. 159; Milnes *v.* Huddersfield (1883), 12 Q. B. D. 443; 53 L. J. Q. B. 12; Batcheller *v.* Tunbridge Wells Gas Co. (1901), 84 L. T. 765; 65 J. P. 680.

House on fire.

The law was formerly much stricter about the safe keeping of fire than it is now. A man was responsible for an *accidental* fire which broke out on his premises and burnt his neighbour's house. And in days when houses were mostly made of wood it was quite right to be strict. But by 14 Geo. 3, c. 78 (the Building Act), it was provided that "no action should lie against any person in whose house, chamber, stable, barn, or other building, or on whose estate any fire should . . . *accidentally* begin" (*u*). A case of some celebrity on the subject is Vaughan *v.* Menlove (*x*). A farmer in Shropshire had a hayrick in a highly dangerous condition. It smoked, and steamed, and showed unmistakeable signs of being about to take fire. To the advice and remonstrances of his neighbours who pointed out its condition, all the answer the farmer vouchsafed was, "Oh, nonsense! I'll chance it." Finally, indeed, he did take a kind of precaution: he made a chimney through the

Vaughan *v.* Menlove.

the Electric Lighting Act, 1882 (45 & 46 Vict. c. 56), does not relieve a company formed thereunder from liability for a nuisance committed in the execution of the powers of the Act. And see Eastern Telegraph Co. *v.* Cape Town Tramways, [1902] A. C. 381; 71 L. J. P. C. 122.

(*u*) Sect. 86.

(*x*) (1837), 3 Bing. N. C. 468; 4 Scott, 244.

rick, which, though done with good intentions, was scarcely wise. The rick took fire, and burnt the plaintiff's cottages in the next field. For this damage the farmer was held responsible. "The care taken by a prudent man," said Tindal, C. J., "has always been the rule laid down; and as to the supposed difficulty of applying it, a jury has always been able to say whether, taking that rule as their guide, there has been negligence on the occasion in question."

Fires caused by servants.

A master is responsible (in spite of 12 Geo. 3, c. 73, s. 35, which imposes penalties on them) for fires negligently caused by his servants whilst carrying into effect their master's orders (*y*). But in Williams *v.* Jones (*z*) a master was held *not* liable for a fire caused by the negligent use of a *pipe* by his servant, because fire had no kind of connection with the work the man was engaged on; and a similar view was taken in another case (*a*), where a maid-servant, whose business was simply to light a fire, took it into her head to clear the chimney of soot by setting it on fire, and burnt the whole place down.

Support from Neighbouring Land.

[125] SMITH *v.* THACKERAH. (1866)

[L. R. 1 C. P. 564; 35 L. J. C. P. 276.]

Smith having built a wall close to the edge of his land, his neighbour, Thackerah, proceeded to dig a well on his own land, but within a few feet of the wall. The consequence was, down went Smith's wall. Smith now went to law for the injury done to his wall, but, *as it appeared that, if there had been no building on Smith's land, he would have suffered no appreciable damage* by Thackerah's proceedings, it was held that he had no right of action.

(*y*) Tubervil *v.* Stamp (1698), 1 Salk. 13; 1 Ld. Raym. 264.

(*z*) (1865), 3 H. & C. 602; 33 L. J. Ex. 297. Justices Blackburn and Mellor, however, dissented from the view of the majority of the Exchequer Chamber.

(*a*) McKenzie *v.* McLeod (1834), 10 Bing. 385; 4 M. & Scott, 249.

DALTON *v.* ANGUS. (1881) [126]

[6 App. Cas. 740; 50 L. J. Q. B. 689.]

Two dwelling-houses adjoined, built independently, but each on the extremity of its owner's soil and having lateral support from the soil on which the other rested. This having continued for much more than twenty years, one of the houses (the plaintiff's) was, in 1849, converted into a coach factory, the internal walls being removed and girders inserted into a stack of brickwork in such a way as to throw much more lateral pressure than before upon the soil under the adjoining house. The conversion was made openly, and without deception or concealment.

More than twenty years after the conversion the owners of the adjoining house employed a contractor to pull down their house and excavate, the contractor being bound to shore up adjoining buildings and make good all damage. The house was pulled down, and the soil under it excavated to a depth of several feet, and the plaintiffs' stack being deprived of the lateral support of the adjacent soil sank and fell, bringing down with it most of the factory.

It was held, by the House of Lords, that the plaintiffs had acquired a right of support for their factory by the twenty years' enjoyment, and could sue the owners of the adjoining house and the contractor for the injury (*b*).

Sic utere tuo.

Every man must so use his own property as not to injure his neighbour's. In virtue of this principle an owner of land is entitled to require that his neighbour, whether he be the owner of the subjacent soil or of the adjacent land, shall not so treat it as to

(*b*) But this prescriptive right can only be acquired when the enjoyment is of such a character that an ordinary owner of land diligent in the protection of his interests would have or must be taken to have a reasonable opportunity of becoming aware of that enjoyment. See Union Lighterage Co. *v.* London Graving Dock Co., [1902] 2 Ch. 557; 71 L. J. Ch. 791.

deprive him of due support. This right, however, exists only in favour of land unweighted by buildings, that is to say, of land in its natural state. The most obvious common sense dictates that a person has no business to load his own soil with buildings in such a way as to make it require the support of his neighbour's land. Such rights to support, however, may be acquired by grant or prescription. This grant may be implied. For example, when one man sells part of his land for building purposes, he impliedly grants sufficient lateral support from his adjacent land for such buildings. He would not be allowed, for instance, to work mines dangerously near to them (*c*). And, even if there is no such easement by grant or prescription, yet, if the damage done to the dominant land is so considerable as to be actionable, damages may be recovered for injury sustained by recently erected buildings. "The moment the jury found," said Pollock, C. B., in Brown *v.* Robins (*d*), "that the subsidence of the land was not caused by the weight of the superincumbent buildings, the existence of the house became unimportant in considering the question of the defendant's liability. It is *as if a mere model stood there*, the weight of which bore so small a proportion to that of the soil as practically to add nothing to it." Thus, if in Smith *v.* Thackerah it had appeared that Smith's land in its natural state would have suffered appreciable damage by Thackerah's well, Smith would have been entitled to claim compensation for the injury occasioned to his wall.

Unweighted by buildings.

Brown *v.* Robins.

Few cases have disclosed greater differences of judicial opinion than the great case of Dalton *v.* Angus. No fewer than thirteen judges delivered their opinions on the questions involved, in addition to the elaborate judgments delivered in the House of Lords, especially those of Lord Selborne, L. C., and Lord Blackburn. It is needless, therefore, to say that the whole of the learning on this subject is to be found in the various reports of this case.

As between adjoining houses, the general rule is that there is *no obligation towards a neighbour cast by law on the owner of a house, merely as such, to keep it standing and in repair:* all he is bound to do is to prevent its becoming a nuisance and falling on to his neighbour's house (*e*). But a right to support of the kind may be gained by grant, express or implied. Where, for instance, two houses are built by the same man, and depend on one another's

Adjoining houses.

(*c*) Elliot *v.* N. E. Ry. Co. (1863), 10 H. L. C. 333; 32 L. J. Ch. 402; and see Siddons *v.* Short (1877), 2 C. P. D. 572; 46 L. J. C. P. 795.

(*d*) (1859), 4 H. & N. 186; 28 L. J. Ex. 250; and see Att.-Gen. *v.* Conduit Colliery Co., [1895] 1 Q. B. 301; 64 L. J. Q. B. 207.

(*e*) Chauntler *v.* Robinson (1849), 4 Ex. 163; 19 L. J. Ex. 170.

support, there remains a mutual right to support after they have passed into the hands of different owners (*f*).

Negligence.

It is to be observed that the right to support which a man may have in favour of his land or buildings is quite independent of the question of negligence. A man, of course, is always responsible to his neighbour for carrying out works on his own lands in a negligent and improper way.

Bonomi *v.* Backhouse.

In the important case of Bonomi *v.* Backhouse (*g*), the question arose as to the time at which an actionable injury arises, and in the end it was held that it dates, not from the time of the commencement of the wrong-doing—the digging, for instance—but from the time of the plaintiff's first sustaining actual injury; the effect of which is, that he will not necessarily be barred by the Statute of Limitations from bringing his action seven or eight years after the defendant's commencing to do that which ultimately resulted in injury to the plaintiff.

Darley Main Colliery case.

The case of Mitchell *v.* The Darley Main Colliery Company (*h*) should be carefully studied. The plaintiff was the owner of some land at Darfield, near Doncaster, and in 1867 and 1868, but not afterwards, the defendants worked a seam of coal lying under and near to his land, which subsided in consequence of their excavations. Some cottages of the plaintiff standing on his land were damaged by the subsidence, and were repaired by the defendants. In 1882, a second subsidence of the plaintiff's land occurred, owing to the defendants' workings in 1867 and 1868, and the plaintiff's cottages were again damaged. In an action it was held (finally by the House of Lords) that the plaintiff's right to sue for the damage done to his cottages in 1882 was not barred by the Statute of Limitations (*i*).

(*f*) Richards *v.* Rose (1853), 9 Ex. 218; 23 L. J. Ex. 3; and see Hide *v.* Thornborough (1846), 2 C. & K. 250; Solomon *v.* Vintners' Co. (1859), 4 H. & N. 585; 28 L. J. Ex. 370; Latimer *v.* Official Co-operative Society (1885), 16 L. R. Ir. 305.

(*g*) (1861), 9 H. L. C. 503; 34 L. J. Q. B. 181.

(*h*) (1885), 11 App. Cas. 127; 55 L. J. Q. B. 529; overruling Lamb *v.* Walker (1878), 3 Q. B. D. 389; 47 L. J. Q. B. 451.

(*i*) In connection with this case, see the case of Brunsden *v.* Humfrey (1884), 14 Q. B. D. 141; 53 L. J. Q. B. 476, where it was held by the Court of Appeal (dissentiente, Lord Coleridge, C. J.) that a plaintiff, who had recovered damages in the county court for injuries to his cab, could afterwards sue for personal injuries arising out of the same act of negligence but which did not develop till after the earlier action had been brought; and the more recent cases of Crumbie *v.* Wallsend Local Board, [1891] 1 Q. B. 503; 60 L. J. Q. B. 392; L. & N. W. Ry. Co. *v.* Evans, [1893] 1 Ch. 16; 62 L. J. Ch. 1; and Glamorganshire Canal Co. *v.* Nixon's Navigation Co. (1901), 85 L. T. 53.

There is no right of action against the owner of a mine, or his lessee, in respect of damage caused by the working of the mine by a predecessor in title, although the actual subsidence which causes the damage occurs when such owner or lessee is in possession (*k*).

Land supported by water.

An owner of land has *no right at common law to the support of subterranean water*. There is nothing, therefore, apart from contract, to prevent an adjoining landowner from draining his soil if for any reason it becomes necessary or convenient for him to do so (*l*).

Highway supported by wall.

In the case of the Highway Board of Macclesfield *v.* Grant (*m*), the action was brought to recover some money the plaintiffs had spent in repairing a wall supporting their highway. The wall belonged to the defendant, and the plaintiffs thought that, as the defendant and his predecessors had occasionally repaired it, he and his successors ought to go on doing so for ever. The defendant refused, and his objection was supported by Mr. Justice Lopes, who considered that "any repairs done by the defendant or his predecessors in title were done for their own convenience, and not in consequence of any obligation."

Other cases.

The following cases on the subject-matter of this note should also be consulted:—Rowbotham *v.* Wilson (1860), 8 H. L. C. 348; 30 L. J. Q. B. 49; Partridge *v.* Scott (1838), 3 M. & W. 220; 1 H. & H. 31; Mundy *v.* Duke of Rutland (1883), 23 Ch. D. 81; 31 W. R. 510; Humphries *v.* Brogden (1850), 12 Q. B. 739; 20 L. J. Q. B. 10; Corporation of Birmingham *v.* Allen (1877), 6 Ch. D. 284; 46 L. J. Ch. 673; Aspden *v.* Seddon (1876), 1 Ex. D. 496; 46 L. J. Ex. 353; Davis *v.* Treharne (1881), 6 App. Cas. 460; 50 L. J. Q. B. 665; Lemaitre *v.* Davis (1881), 19 Ch. D. 281; 46 L. T. 407; Rigby *v.* Bennett (1882), 21 Ch. D. 559; 40 L. T. 47; Normanton Gas Co. *v.* Pope and Pearson (1883), 52 L. J. Q. B. 629; 32 W. R. 134; Love *v.* Bell (1884), 9 App. Cas. 286; 53 L. J. Q. B. 257; Chapman *v.* Day (1883), 47 L. T. 705; Dixon *v.* White (1883), 8 App. Cas. 833; and New Sharlston Collieries Co. *v.* Westmorland (1900), 82 L. T. 725.

(*k*) Greenwell *v.* Low Beechburn Coal Co., [1897] 2 Q. B. 165; 66 L. J. Q. B. 643; Hall *v.* Norfolk, [1900] 2 Ch. 493; 69 L. J. Ch. 571.

(*l*) Popplewell *v.* Hodkinson (1869), L. R. 4 Ex. 248; 38 L. J. Ex. 126.

(*m*) (1882), 51 L. J. Q. B. 357.

Nuisances.

SOLTAU *v.* DE HELD. (1851) [127]

[2 Sim. N. S. 133; 21 L. J. Ch. 153.]

Soltau resided in a semi-detached house at Clapham. The adjoining house was, from 1817 to 1848, occupied as a private house, but in the latter year it was bought by a religious order of Roman Catholics, calling themselves "The Redemptionist Fathers," and those gentlemen converted the house into a chapel, and appointed De Held, a Roman Catholic priest, to officiate therein. One of the first acts of De Held, on entering on the scene of his ministrations, was to set up a harsh and discordant bell, and to ring it at the most unnecessary times. As Soltau, speaking for himself and the neighbours generally, said plainly—"The practice we complain of is offensive alike to our ears and feelings; disturbs the quiet and comfort of our houses; molests us in our engagements, whether of business, amusement, or devotion; and is peculiarly injurious and distressing when members of our household happen to be invalids; it tends also to depreciate the value of our dwelling-houses." This was a complaint emanating, not from the general body of Claphamites, who, being at a greater distance, were more or less indifferent to the matter, but from those who were the greatest sufferers, the immediate neighbours, and it was on this ground of special annoyance that Soltau was considered entitled to relief.

Public nuisance, when actionable.

Nuisances are divided into two classes, *public* and *private*, and the rule is, that it is only in respect of *the latter* that an action can be brought. A *public* nuisance is suppressed by indictment or information; it is the public that is supposed to be aggrieved by what

the defendant has done, and individuals, as individuals, have nothing to do with it. To this rule Soltau *v.* De Held offers an exception, viz., that when the public nuisance is particularly obnoxious to an individual, it is considered, as far as he is concerned, to be also a private nuisance, and he may bring his action or apply for an injunction. To take a venerable illustration, "*If A. dig a trench across the highway*, this is the subject of an indictment; but *if B. fall into it*, the particular damage thus sustained by him will support an action." The bell-ringing, in so far as it was a nuisance to all Clapham, was a public nuisance; and the proper way to put it down was by indictment or information; but, in so far as it was a nuisance to Soltau personally, it was a private nuisance, and an action lay. So in Iveson *v.* Moore (*n*) the obstruction of a highway, so as to prevent customers from coming to a colliery, was held to be an actionable nuisance; and in Benjamin *v.* Storr (*o*) a coffee-house keeper in a narrow street near Covent Garden successfully went to law with some auctioneers who made an unreasonable use of the highway by their vans blocking up the approaches to his premises and intercepting the light, and by the offensive smells arising from the staleing of their horses. But mere delay caused by an obstruction of the highway, or the trouble and expense of removing it, being common to all, will not support an action (*p*).

Iveson *v.* Moore.

Benjamin *v.* Storr.

Winterbottom *v.* Derby.

People must not be too fastidious.

There is another important practical division of nuisances to which attention is requested, viz., into those which cause damage to *property*, and those which merely cause *personal* discomfort. When a nuisance causes substantial damage to a man's property, he can always get compensation for it; but he must put up with a good deal—there must be a real interference with the comfort of human existence—before he can successfully go to law for an annoyance of the other kind (*q*).

(*n*) (1700), 1 Ld. Raym. 486; and see Fritz *v.* Hobson (1880), 14 Ch. D. 542; 49 L. J. Ch. 321; and Att.-Gen *v.* Brighton and Hove Co-operative Supply Association, [1900] 1 Ch. 276; 69 L. J. Ch. 204. See also Rex *v.* Russell (1805), 6 East, 427; 8 R. R. 506; Rex *v.* Cross (1812), 3 Camp. 224; 13 R. R. 794; and Att.-Gen. *v.* Sheffield Gas Co. (1853), 3 D. M. & R. 304, 339.

(*o*) (1874), L. R. 9 C. P. 400; 43 L. J. C. P. 162; and see Rose *v.* Miles (1815), 4 M. & S. 101; 16 R. R. 405; Hubert *v.* Groves (1794), 1 Esp. 148; and Rapier *v.* London Tramways Co., [1893] 2 Ch. 588; 63 L. J. Ch. 36; Germaine *v.* London Exhibitions Co. (1896), 75 L. T. 101.

(*p*) Winterbottom *v.* Derby (1862), L. R. 2 Ex. 316; 36 L. J. Ex. 194; and see Ricket *v.* Metr. Ry. Co. (1867), L. R. 2 H. L. 175; 36 L. J. Q. B. 205.

(*q*) St. Helen's Smelting Co. *v.* Tipping (1865), 11 H. L. C. 642; 35 L. J. Q. B. 66; and see Crump *v.* Lambert (1867), L. R. 3 Eq.

Importance of particular circumstances.

A great deal, too, depends on the locality and circumstances. What is a nuisance in one place may not be in another (*r*).

And on this point reference may be made to the recent case of Bartlett *v.* Marshall (*s*), where an injunction was granted against a firm of newspaper forwarding agents carrying on business in the city of London at the instance of the occupiers of certain residential premises opposite, who had been so disturbed by the noise of the defendants' carts and the shouts of their drivers between 2 a.m. and 6 a.m. as to be unable to sleep.

Coming to a nuisance.

It is no answer to an action for a nuisance that the plaintiff knew that there was a nuisance, and yet went voluntarily and pitched his tent near it (*t*).

Innocent intention no excuse.

A man may be responsible for a nuisance, if it were the *probable consequence* of his act, although his intentions were not only innocent but praiseworthy; as, for instance, where a publican erected an urinal, but arranged the premises in such a way that a space left was habitually used for improper purposes (*u*).

Two rights sometimes make a wrong.

The acts of two or more persons may, taken together, constitute such a nuisance that the Court will restrain all from doing the acts constituting the nuisance, although the annoyance occasioned by the act of any one of them if taken alone would not amount to a nuisance. The case of Lambton *v.* Mellish (*x*) affords a good illustration of this principle. The defendants were rival refreshment contractors at Ashstead Common in Surrey, who, with the view of attracting visitors to their respective merry-go-rounds and refreshment houses, made use of powerful organs. The noise occasioned by these organs was objected to by the plaintiff, a resident in the vicinity, and the Court granted him an injunction restraining both defendants from creating the objectionable noise.

409; affirmed, 17 L. T. 133; Walter *v.* Selfe (1851), 4 De G. & Sm. 315; 20 L. J. Ch. 433; Salvin *v.* N. Brancepeth Coal Co. (1874), L. R. 9 Ch. 705; 44 L. J. Ch. 149; Shotts Iron Co. *v.* Inglis (1882), 7 App. Cas. 518; Walker *v.* Brewster (1867), L. R. 5 Eq. 25; 37 L. J. Ch. 33; Christie *v.* Davey, [1893] 1 Ch. 316; 62 L. J. Ch. 439.

(*r*) Bamford *v.* Turnley (1862), 3 B. & S. 66; 31 L. J. Q. B. 286. See also Broder *v.* Saillard (1876), 2 Ch. D. 692; 45 L. J. Ch. 414; Robinson *v.* Kilvert (1889), 41 Ch. D. 88; 58 L. J. Ch. 392; Reinhardt *v.* Mentasti (1889), 42 Ch. D. 685; 58 L. J. Ch. 787, which last case was discussed and explained in Sanders-Clark *v.* Grosvenor Mansions Co., [1900] 2 Ch. 373; 69 L. J. Ch. 579; and Att.-Gen. *v.* Cole, [1901] 1 Ch. 205; 70 L. J. Ch. 148.

(*s*) (1896), 44 W. R. 251; 60 J. P. 104.

(*t*) Per Byles, J., in Hole *v.* Barlow (1858), 27 L. J. C. P. 208; 4 C. B. N. S. 334.

(*u*) Chibnall *v.* Paul (1881), 29 W. R. 536. As to a nuisance caused by the collecting of crowds, see *ante*, p. 461.

(*x*) [1894] 3 Ch. 163; 63 L. J. Ch. 929.

"It was said for the defendant," said Chitty, J., "that two rights cannot make a wrong—by that it was meant that if one man makes a noise not of a kind, duration, or degree sufficient to constitute a nuisance, and another man, not acting in concert with the first, makes a similar noise at the same time, each is responsible only for the noise made by himself, and not also for that made by the other. . . . . In my opinion each is separately liable. . . . . I think the point falls within the principle laid down by Lord Justice James in Thorpe *v.* Brumfitt (*y*). That was a case of obstructing a right of way, but such obstruction was a nuisance in the old phraseology of the law. He says: 'Suppose one person leaves a wheelbarrow standing on a way, that may cause no appreciable inconvenience; but if a hundred do so, that may cause a serious inconvenience, which a person entitled to the use of the way has a right to prevent; and it is no defence to any one person among the hundred to say that what he does causes of itself no damage to the complainant.' There is, in my opinion, no distinction in these respects between the case of a right of way and the case, such as this is, of a nuisance by noise. *If the acts of two persons, each being aware of what the other is doing, amount in the aggregate to what is an actionable wrong, each is amenable to the remedy against the aggregate cause of complaint.*"

Statutory right to be a nuisance.

It is a good defence, however, to an action for a nuisance to show that the act complained of was expressly authorized by statute (*z*); and sometimes the defendant may claim an easement which entitles him to annoy the plaintiff. But user which is neither physically preventible by the owner of the servient tenement, nor actionable, cannot found an easement (*a*).

Easement.

Continuing nuisance.

Where the nuisance is of a continuing kind, so that successive actions may be brought, the jury cannot give damages for anything after the date of the commencement of the action (*b*).

Reversioner suing for nuisance.

It is to be observed that when a nuisance is of a permanent nature, or injurious to the reversion, not only the tenant in possession, but the reversioner also, may sue (*c*).

Abatement of nuisances.

The law gives a peculiar remedy for nuisances by which a man may right himself without legal proceedings. This remedy is called

(*y*) (1873), L. R. 8 Ch. 650. But as to the form of action, see Sadler *v.* G. W. Ry. Co., [1896] A. C. 450; 65 L. J. Q. B. 462.

(*z*) See Vaughan *v.* Taff Vale Ry. Co., *ante*, p. 518.

(*a*) Sturges *v.* Bridgman (1879), 11 Ch. D. 852; 48 L. J. Ch. 875.

(*b*) Battishill *v.* Reed (1856), 18 C. B. 696; 25 L. J. C. P. 290.

(*c*) Bedingfield *v.* Onslow (1685), 3 Lev. 209; and see Kidgill *v.* Moor (1850), 9 C. B. 364; 19 L. J. C. P. 177; Young *v.* Spencer (1829), 10 B. & C. 145; 5 M. & R. 47; Cooper *v.* Crabtree (1882), 20 Ch. D. 589; 51 L. J. Ch. 544.

abatement, and consists in the removal of the nuisance. A nuisance may be abated by the party aggrieved thereby, so that he commits no riot in the doing of it, nor occasions, in the case of a private nuisance, any damage beyond what the removal of the inconvenience necessarily requires (*d*); but a man cannot enter a neighbour's land to prevent an apprehended nuisance. It is, however, generally very imprudent to attempt to abate a nuisance; it is better to apply for an injunction.

The Attorney-General.

In a modern case (*e*) it has been held that the Attorney-General may sue to restrain acts of interference with the public ways without proof of public injury. And in Attorney-General *v.* Tod-Heatley (*f*) it was decided that it is the duty at common law of the *owner of vacant land* to prevent his land from being a public nuisance, although such a nuisance may be caused by the acts of other persons; and the Attorney-General, on behalf of the public, is entitled to an injunction to prevent such owner from committing a breach of that duty.

Quia timet action.

In Fletcher *v.* Bealey (*g*), it was held that, in order to maintain a *quia timet* action to restrain an apprehended injury, the plaintiff must prove imminent danger of a substantial kind, or that the apprehended injury, if it does come, will be irreparable. The plaintiff was a paper manufacturer on the Irwell near Manchester, and was terribly afraid of a large heap of refuse which the defendants, who were alkali manufacturers, were depositing on some land a mile or two higher up the river. Though there was a considerable prospect of damage ultimately resulting, it was held that the plaintiff was premature in bringing his action, and an injunction was refused him.

(*d*) Steph. Comm. Bk. V. Ch. 1.

(*e*) The Att.-Gen. *v.* Shrewsbury Bridge Co. (1882), 21 Ch. D. 752; 51 L. J. Ch. 746.

(*f*) [1897] 1 Ch. 560; 66 L. J. Ch. 275, applying the principles laid down in Reg. *v.* Watts (1703), 1 Salk. 357; and Reg. *v.* Bradford Navigation Co. (1865), 34 L. J. Q. B. 191; 6 B. & S. 631.

(*g*) (1885), 28 Ch. D. 688; 54 L. J. Ch. 424; and see Ripon *v.* Hobart (1834), 3 My. & K. 169; 3 L. J. (N. S.) Ch. 145; Att.-Gen. *v.* Kingston (1865), 13 W. R. 888; 34 L. J. Ch. 481; Salvin *v.* North Brancepeth Coal Co. (1874), L. R. 9 Ch. 705; 44 L. J. Ch. 149; Bendelow *v.* Wortley Union (1887), 57 L. J. Ch. 762; 57 L. T. 849; and Att.-Gen. *v.* Manchester Corp., [1893] 2 Ch. 87; 62 L. J. Ch. 459.

Seduction.

[128] TERRY *v.* HUTCHINSON. (1868)

[L. R. 3 Q. B. 599; 37 L. J. Q. B. 257.]

The plaintiff's daughter had been seduced by the defendant, and the question to be decided was in whose service was the girl at the time the seduction took place, the defendant denying that the daughter was in the service of her father, the plaintiff, at that time. The facts were as follows: the plaintiff's daughter, aged nineteen, was in the service of a draper at Deal. For misconduct, her master dismissed her summarily, and she was on her way to her father's house at Canterbury when she was seduced in the railway carriage by the defendant. The Court, upon these facts, held that there was sufficient evidence that the girl at the time of her seduction was in the service of her father, the plaintiff, inasmuch as she was on her way to resume her former position as a member of her father's family. "The girl," said the Court, "is under twenty-one, and is therefore *primâ facie* under the dominion of her natural guardian; and as soon as a girl under age ceases to be under the control of a real master and intends to return to her father's house, he has a right to her services, and therefore there was a constructive service in the present case."

A legal fiction.

The action for seduction is based upon a fiction. The plaintiff is supposed to be the *master* of the girl seduced, and to have lost the benefit of her *services* by what the defendant has done to her. It is not necessary, however, for the plaintiff to prove any express contract of service. If he is the father, and his child is under age and not in actual service with someone else, service will be presumed (*h*);

Proof of service.

(*h*) Evans *v.* Walton (1867), L. R. 2 C. P. 615; 36 L. J. C. P. 307.

and if he is not the father, or the girl is not under age, service will, if she was living under his roof, be presumed from such slight acts of household duty as making tea or milking cows (*i*). On the other hand, if the plaintiff's daughter was, at the time of the seduction, in the service of another man—though that other were himself the seducer—no action would lie (*k*). In Manley *v.* Field (*l*), the woman seduced rented a house and carried on the business of a milliner, her mother and the younger members of her father's family residing with her, and receiving part of their support from the proceeds of her business. The furniture in the house belonged to the father, who occasionally visited his family there, and contributed something to their support. It was held on those facts that there *was no evidence of service*. In Hedges *v.* Tagg (*m*), the plaintiff's daughter was in service as a governess, and was seduced by the defendant whilst on a three days' visit, with her employer's permission, to the plaintiff, her mother, for the purpose of attending some races at Oxford. During her visit she gave some assistance in household duties. In spite, however, of this fact, it was held she was not in her mother's service and the action could not be maintained. And in Whitbourne *v.* Williams (*n*), the plaintiff's daughter was seduced by the defendant while in his service as a barmaid and general assistant, earning her board and lodging and eight shillings a week. On one day in the week she used to visit her father's house and help her mother in the household work and care of the children. It was held that, under these circumstances, the girl was not in her father's service. Moreover, it would appear that where the girl is in the service of one man at the time of the seduction, and of another at the time of the pregnancy and illness, no action lies. The first master could not sue, because there was no illness and loss of service while she was with him; and the second could not, because the woman was not seduced while in his service (*o*).

Daughter head of separate establishment.

Governess on a visit home.

Barmaid seduced by her master.

Serving two masters.

An action for seduction cannot be successfully brought against a man who, though the seducer, was not the father of the child whose birth occasioned the loss of service (*p*).

Seducer, but not father of the child.

(*i*) Bennett *v.* Allcott (1787), 2 T. R. 166; 31 R. R. 667, n.; Rist *v.* Faux (1863), 4 B. & S. 409; 32 L. J. Q. B. 386.

(*k*) Dean *v.* Peel (1804), 5 East, 45; 1 Smith, 333; Grinnell *v.* Wells (1844), 7 M. & G. 1033; 14 L. J. C. P. 19.

(*l*) (1859), 7 C. B. N. S. 96; 29 L. J. C. P. 79.

(*m*) (1872), L. R. 7 Ex. 283; 41 L. J. Ex. 169.

(*n*) [1901] 2 K. B. 722; 70 L. J. K. B. 933.

(*o*) Davies *v.* Williams (1847), 10 Q. B. 725; 16 L. J. Q. B. 369; Gladney *v.* Murphy (1891), 26 L. R. Ir. 651; and see Hedges *v.* Tagg, *supra*.

(*p*) Eager *v.* Grimwood (1847), 1 Ex. 61; 16 L. J. Ex. 236.

Married woman.

A married woman, separated from her husband and living with her father, may be the latter's servant, so that he can maintain an action for seduction (*q*).

Pretended hiring.

Although a master may, as a rule, seduce his servant with impunity, it is a question for the jury whether the hiring was *bonâ fide*, or for the express purpose of seduction, as in Speight *v.* Oliviera (*r*), where the wealthy defendant kept an empty house for the express purpose of engaging a pretty girl to look after it.

The damages.

Although the action for seduction purports to be only an action for loss of services, that is not the scale on which the damages are calculated. "In point of form," said Lord Eldon, in a seduction case, "the action only purports to give a recompense for loss of service; but we cannot shut our eyes to the fact that this is an action brought by a parent for an injury to her child; in such case I am of opinion that the jury may take into their consideration all that she can feel from the nature of the loss. They may look upon her as a parent losing the comfort as well as the service of her daughter, in whose virtue she can feel no consolation, and as the parent of other children whose morals may be corrupted by her example" (*s*). The plaintiff may show that the defendant was addressing his daughter as an honourable suitor (*t*), and may show his situation in life (*u*), but not his pecuniary position (*x*). He is not allowed to give evidence of his daughter's good character till the other side try to shake it (*y*).

Girl's character.

In mitigation of damages, evidence of the girl's immodest character or conduct may be given (*z*). The defendant may also show that by encouraging profligate acquaintanceships, the plaintiff is really the author of her own wrong (*a*).

Death.

When death is caused by seduction probably no action can be maintained (*b*).

Bastardy order.

It was recently held by the Divisional Court (*c*) that an order of quarter sessions quashing a bastardy order is not a bar to an action for seduction by the employer of the woman who had obtained the bastardy order.

(*q*) Harper *v.* Luffkin (1827), 7 B. & C. 387; 1 M. & R. 166.

(*r*) (1819), 2 Starkie, 493; 20 R. R. 728.

(*s*) Bedford *v.* McKowl (1800), 3 Esp. 119.

(*t*) Dodd *v.* Norris (1814), 3 Camp. 519; 14 R. R. 832.

(*u*) Andrews *v.* Askey (1837), 8 C. & P. 7.

(*x*) Hodsoll *v.* Taylor (1873), L. R. 9 Q. B. 79; 43 L. J. Q. B. 14.

(*y*) Bamfield *v.* Massey (1808), 1 Camp. 460.

(*z*) Verry *v.* Watkins (1836), 7 C. & P. 308.

(*a*) Reddie *v.* Scoolt (1795), 1 Peake, 316.

(*b*) Osborn *v.* Gillett (1873), L. R. 8 Ex. 88; 24 L. J. Ex. 53.

(*c*) Anderson *v.* Collinson, [1901] 2 K. B. 107; 70 L. J. K. B. 620.

It has been held in an action for seduction, that the plaintiff will not be ordered to give particulars of the times and places when the seduction took place, until the defendant has made an affidavit denying the seduction (*d*). Particulars.

Action for Deceit.

PASLEY *v.* FREEMAN. (1789) [129]

[3 T. R. 51; 1 R. R. 634.]

Pasley, the plaintiff, was a person who dealt in cochineal, and at the time when the cause of action arose had a large stock on hand of which he was anxious to dispose. Freeman, the defendant, hearing of this, told Pasley that he knew a Mr. Falch who would purchase the cochineal. Pasley said, "*Is he a respectable and substantial person?*" "*Certainly he is,*" answered Freeman, well knowing he was nothing of the sort. On the faith of this representation Pasley let Falch have sixteen bags of cochineal, of the value of nearly £3,000, on credit. Upon the bill becoming due it turned out that Falch was insolvent, and being unable to recover his money from Falch, Pasley sued Freeman for making to him a false representation whereby he was damnified, and it was held that Freeman was liable to Pasley to the extent that he had suffered in consequence of Freeman's false statement as to the credit and character of Falch.

By the 4th section of the Statute of Frauds, "no action shall be brought upon any promise to answer for the debt, default, or miscarriage of another, unless such promise is in writing and signed Statute of Frauds, fourth section.

(*d*) Thompson *v.* Birkley (1883), 47 L. T. 700; 31 W. R. 230.

by the party chargeable." Freeman's representation was not in writing, why therefore was he held liable? The reason is this: that section refers only to *contracts*, and Pasley sued Freeman *in tort*, and it is a well-known principle of law, "*that wherever deceit or falsehood is practised to the detriment of another, there the law will give redress.*" Pasley *v.* Freeman was, however, a substantial violation of the Statute of Frauds, and it gave birth to a progeny of similar cases; till at length Lord Tenterden passed an Act in the ninth year of George the Fourth which provided that no one who had made any representation as to the "conduct, character, credit, ability," &c. of another in order to induce people to trust him, should be liable to an action for false representation unless his statement were in writing and signed by him (*e*). The point cannot be said to be quite settled, but it is probable that to represent a particular property, on the security of which a person was thinking of lending money, to be sound and safe (*e.g.*, to say that a person's life interest in certain trust funds was charged only with three annuities) would be held to be precisely the same thing as representing the man himself to be solvent, for a man's "*ability*" consists in the things that he has (*f*).

Lord Tenterden's Act, 9 Geo. 4, c. 14.

Person representing, nothing to gain.

It was held in Pasley *v.* Freeman that it is no defence to an action of the kind that the defendant had no interest in and was to gain nothing from telling his untruth.

Thus in the case of Leddell *v.* McDougal (*g*), where the defendant, in answer to the plaintiff's letter asking him if he could recommend a man named Thornton as a safe and responsible tenant, had had "*much pleasure in replying affirmatively*" though he knew Thornton to be a man of no resources, and that he had more than once failed in business similar to the one he now wished to enter into, it was held that it was of no consequence that what the defendant had said he had said out of mere kindness and had no idea of making a halfpenny out of it, or even of deliberately deceiving the plaintiff.

In Pearson *v.* Seligman (*h*), it was held that it was no defence to prove that the false representation was made for the benefit of the person making it and not for the benefit of the person praised.

(*e*) See Clydesdale Bank *v.* Paton, [1896] A. C. 381; 65 L. J. P. C. 73.

(*f*) Lyde *v.* Barnard (1836), 1 M. & W. 101; 1 Gale, 388; and see Swann *v.* Phillips (1838), 8 Ad. & E. 457; 3 N. & P. 447; and also Joliffe *v.* Baker (1883), 11 Q. B. D. 255; 52 L. J. Q. B. 609.

(*g*) (1881), 29 W. R. 403; and see Haycraft *v.* Creasy (1801), 2 East, 92; 6 R. R. 380.

(*h*) (1883), 31 W. R. 730 48 L. T. 842.

To ground an action for deceit it is not necessary that the false representation should be *made directly to the plaintiff*. It is enough that the defendant intended that the plaintiff should act upon it. If bank directors, for instance, circulate a false report formally addressed to their shareholders, but really intended to catch widows and clergymen with money to invest, a widow or clergyman who has thereby been inveigled into buying shares may sue for the loss she or he has sustained (*i*). And it has been held in a recent case (*k*) that where a prospectus is issued not merely for the purpose of inviting persons to subscribe for shares, but also to induce persons to purchase the shares of the company in the open market, the office of the prospectus is not exhausted upon the allotment of shares; and a person who, having received a prospectus, afterwards purchases shares in the open market relying upon false representations contained in such prospectus has a cause of action against the promoters in respect of such false representations. But if the plaintiff *did not rely on the false statement* complained of, he cannot maintain an action for deceit (*l*). Representation need not be direct.

In an action for deceit the plaintiff must show, first, that the false statements made to him were fraudulent; secondly, that they were a cause inducing him to act to his prejudice (*m*). What plaintiff must show.

In another case a man, for the purpose of enabling a company to have a fictitious credit in case of inquiries at their bankers, placed money to their credit which they were told to hold in trust for him. Some of the money having been drawn out with his consent, and the company having been ordered to be wound up while a balance remained: it was held that he could not claim to have the balance paid to him (*n*). Interest of third parties.

In the case of Smith *v.* Land and House Property Corporation (*o*), the plaintiffs advertised for sale by auction an hotel stated in the *Simplex commendatio.*

(*i*) Scott *v.* Dixon (1860), 29 L. J. Ex. 62, n.; and see Peek *v.* Gurney (1873), L. R. 6 H. L. 377; 43 L. J. Ch. 19; Barry *v.* Crosskey (1861), 2 J. & H. 1; Gerhard *v.* Bates (1853), 2 E. & B. 476; 22 L. J. Q. B. 364; Richardson *v.* Silvester (1873), L. R. 9 Q. B. 34; 43 L. J. Q. B. 1; Carlill *v.* Carbolic Smoke Ball Co., [1893] 1 Q. B. 256; 62 L. J. Q. B. 257.

(*k*) Andrews *v.* Mockford (No. 1), [1896] 1 Q. B. 372; 65 L. J. Q. B. 302, distinguishing Peek *v.* Gurney, *supra*.

(*l*) Smith *v.* Chadwick, *post*.

(*m*) Taylor *v.* Ashton (1843), 11 M. & W. 401; 12 L. J. Ex. 363; Smith *v.* Chadwick (1884), 9 App. Cas. 187; 53 L. J. Ch. 873; Edgington *v.* Fitzmaurice (1885), 29 Ch. D. 459; 55 L. J. Ch. 650; Derry *v.* Peek (1889), 14 App. Cas. 337; 58 L. J. Ch. 864.

(*n*) *In re* Great Berlin Steamboat Co. (1884), 26 Ch. D. 616; 54 L. J. Ch. 68; Hart *v.* Swain (1877), 7 Ch. D. 42; 47 L. J. Ch. 5; Evans *v.* Edmonds (1853), 13 C. B. 777; 22 L. J. C. P. 211; Arkwright *v.* Newbold (1881), 17 Ch. D. 301; 44 L. T. 393.

(*o*) (1884), 28 Ch. D. 7; 51 L. T. 718.

particulars to be held by a "*most desirable tenant.*" The defendants sent their secretary down to inspect the property and report thereon. The secretary reported very unfavourably, stating that the tenant could scarcely pay the rent (£400), rates and taxes. The defendants, relying on the statements in the particulars, authorized the secretary to attend the sale and to bid up to £5,000. The property was bought in at the sale and the secretary purchased it by private contract for £4,700. It appeared subsequently that the quarter's rent previous to the sale had not been paid; the previous quarter had been paid by instalments, and six weeks after the sale the tenant filed his petition. It appeared, however, that the hotel business was as good during the last year as previously, and that the month of the tenant's failure was the best he had had. The plaintiffs brought an action for specific performance, relying in answer to the defence and counterclaim for rescission (on the ground of misrepresentation) on the fact that the defendants had made their own inquiries. It was held that the statement that the property was held by a "*most desirable tenant*" could not be treated as "*simplex commendatio*," and that the defendants, having relied thereon, were entitled to rescission of the contract on the authority of Redgrave *v.* Hurd (1881), 20 Ch. D. 1; 51 L. J. Ch. 113.

Omission in prospectus.

The directors of a company issued a prospectus inviting subscriptions for debentures stating that the property of the company was subject to a mortgage of £21,500, but omitting to state a second mortgage of £5,000. The prospectus further stated that the objects of the issue of debentures were (1) to purchase horses and vans; (2) to complete alterations and additions; (3) to supply cheap fish. The true object was to get rid of pressing liabilities. The plaintiff advanced £1,500 upon debentures under the erroneous belief that the prospectus offered him a charge, and would not have advanced his money but for such belief, but he also relied upon the false statements contained in the prospectus as to the financial condition of the company. The Court held that the misstatement of the objects for which the debentures were issued was a material misstatement of fact, influencing the conduct of the plaintiff, and rendered the directors liable to an action for deceit, although the plaintiff was also influenced by his own mistake (*p*).

Onus of proof.

In order to enforce a contract in which the defendant sets up the plea that he was induced by fraud to enter into the contract, it is not necessary for the defendant expressly to repudiate the contract; in order to rebut the plea, it is for the plaintiff to show that the

(*p*) Edgington *v.* Fitzmaurice (1885), 29 Ch. D. 459; 53 L. T. 369.

defendant had adhered to the contract notwithstanding the discovery of the fraud (*q*).

Fraud must be shown.

It is not enough to show that the statement in a prospectus is untrue, it may have been merely expressive of sanguine confidence; fraudulent misrepresentation must be shown (*r*). It was decided in the House of Lords in Derry *v.* Peek (*s*) that a false statement, made through carelessness and without reasonable ground for believing it to be true, may be evidence of fraud, but does not necessarily amount to fraud. Such a statement, if made in the honest belief that it is true, is not fraudulent and does not render the person making it liable to an action of deceit. The facts in this case were very simple. A special Act incorporating a tramway company provided that the carriages might be moved by animal power, and, with the consent of the Board of Trade, by steam power. The directors issued a prospectus containing a statement that by their special Act the company had the right to use steam power instead of horses. The Board of Trade afterwards refused their consent to the use of steam power and the company was wound up. The plaintiff, having taken shares on the faith of this statement, brought an action of deceit against the directors, but failed on the ground that the statement as to steam power was made in the honest belief of its truth. In the learned and exhaustive judgment delivered by Lord Herschell will be found a full discussion of the authorities in actions of deceit, and it will well repay a careful perusal (*t*). Fraud sufficient to support an action of deceit is proved if it is shown that a false representation has been made knowingly, or without belief in its truth, or recklessly, without caring whether it be true or false.

Derry *v.* Peek.

Reference should be made to the case of Le Lievre *v.* Gould (*u*).

Le Lievre *v.* Gould.

(*q*) Aaron's Reefs, Limited *v.* Twiss, [1896] A. C. 273; 65 L. J. P. C. 54.

(*r*) Bellairs *v.* Tucker (1884), 13 Q. B. D. 562. See also Roots *v.* Snelling (1883), 48 L. T. 216.

(*s*) (1889), 14 App. Cas. 337; 58 L. J. Ch. 864. A criticism of this decision by Sir F. Pollock appeared in the Law Quarterly Review (1889), p. 410; the case is, on the other hand, supported by Sir W. Anson in the same Review (1890), p. 72. See also Glasier *v.* Rolls (1889), 42 Ch. D. 436; 58 L. J. Ch. 820; Knox *v.* Hayman (1892), 67 L. T. 137; Angus *v.* Clifford, [1891] 2 Ch. 449; 60 L. J. Ch. 443; Low *v.* Bouverie, [1891] 3 Ch. 82; 60 L. J. Ch. 594; Oliver *v.* Bank of England, [1902] 1 Ch. 610; 71 L. J. Ch. 388; and in the House of Lords, *sub nom.* Starkey *v.* Bank of England, [1903] A. C. 114; 72 L. J. Ch. 402.

(*t*) Reference should also be made to the Directors' Liability Act, 1890 (53 & 54 Vict. c. 64), and the cases decided thereon, the latest of which are McConnel *v.* Wright, [1903] 1 Ch. 546; Broome *v.* Speak, [1903] 1 Ch. 586; 72 L. J. Ch. 251; and Gerson *v.* Simpson, Reitlinger, third party, [1903] 2 K. B. 197; 72 L. J. K. B. 603.

(*u*) [1893] 1 Q. B. 491; 62 L. J. Q. B. 353.

Mortgagees advanced money to a builder upon the faith of certain certificates given by a surveyor. The certificates contained untrue statements, the result of the negligence of the surveyor, but there was no fraud on his part, and no contractual relation between him and the mortgagees. It was held, that the surveyor owed no duty to the mortgagees to exercise care in giving the certificates, and that consequently he was under no liability to them. "No doubt," said Lord Esher, M. R., "the defendant did give untrue certificates; it was negligent on his part to do so, and it may even be called gross negligence. But can the plaintiffs rely upon negligence in the absence of fraud? The question of liability for negligence cannot arise at all until it is established that the man who has been negligent owed some duty to the person who seeks to make him liable for his negligence. What duty is there when there is no relation between the parties by contract? *A man is entitled to be as negligent as he pleases towards the whole world if he owes no duty to them.* The case of Heaven *v.* Pender (*x*) has no bearing upon the present question. No doubt, if Cann *v.* Willson (*y*) stood as good law, it would cover the present case. But I do not hesitate to say that *Cann* v. *Willson is not now law.* A man must be said to have a fraudulent mind if he recklessly makes a statement intending it to be acted upon, and not caring whether it be true or false. . . A man who thus acts must have a wicked mind. *But negligence, however great, does not of itself constitute fraud.*"

The water-finder's mistake.

This case was distinguished in the recent case of Pritty *v.* Child (*z*). The defendant, a professional waterfinder, undertook for reward to indicate a spot upon the plaintiff's land where a supply of water might be found. He came to the land, marked out a spot, and stated definitely that water would be found there at a particular depth from the surface. The plaintiff, on the faith of this statement, bored to a depth exceeding that named by the defendant, but found no water. The plaintiff brought an action in the County Court to recover the expense of boring. The County Court judge found that the defendant made the statement recklessly, but did not find that he made it fraudulently. The Divisional Court held that the contractual relation between the parties imposed upon the defendant the duty to refrain from making reckless statements; that the defendant had committed a breach of this duty, and was therefore liable in an action for damages.

Ajello *v.* Worsley.

A misrepresentation which does not itself, but which is merely incidental to some lawful act which does, cause damage is not

(*x*) (1883), 11 Q. B. D. 503; 52 L. J. Q. B. 702.
(*y*) (1888). 39 Ch. D. 39; 57 L. J. Ch. 1034.
(*z*) (1902), 71 L. J. K. B. 512.

actionable. Thus, when a trader causes injury to the trade of another by advertising or otherwise offering for sale, at less than the ordinary retail price, goods of the other's manufacture, though he has not such goods in stock at the time, but only an expectation of acquiring them, no cause of action thereby accrues (*a*).

Of course, a misrepresentation, though not sufficient to support an action of deceit, may be enough to create the right to rescind a contract based upon it (*b*).

Maddison *v.* Alderson.

In Maddison *v.* Alderson (*c*) the plaintiff was induced to serve a man as his housekeeper for many years and to give up other prospects of advancement in life, by a verbal promise made by him to leave her a farm for her life. He signed a will leaving the farm in accordance with his promise; but the will was not duly witnessed. The Lord Chancellor Selborne held, that assuming a contract in fact, there was no part performance unequivocally referable to a contract so as to exclude the operation of the Statute of Frauds; and that the plaintiff could not recover the farm from the man's heir.

Concealment of material fact.

The fraudulent purpose must be proved by the plaintiff. The active concealment of a material fact, *e.g.*, where the vendor of a house plasters over a defect in the wall, may operate as a misrepresentation (*d*), but not so a mere non-disclosure where there is no duty to disclose, as in the diseased pigs case, where the seller declined to give any kind of warranty or representation as to them, but left the purchaser to go entirely by their appearance (*e*). As to the rescinding of contracts on grounds of fraud, the equity leading cases of Shirley *v.* Stratton (*f*), Attwood *v.* Small (*g*), and Redgrave *v.* Hurd (*h*), should be referred to.

Fraud a defence to a foreign judgment.

In Abouloff *v.* Oppenheimer & Co., it was decided that a foreign judgment obtained by the fraud of a party to the suit in the foreign Court cannot be afterwards enforced by him in an action brought in an English Court, even although the question whether the fraud had been perpetrated was investigated in the foreign Court and it was there decided that the fraud had not been committed (*i*).

(*a*) Ajello *v.* Worsley, [1898] 1 Ch. 274; 67 L. J. Ch. 172; distinguishing Richardson *v.* Silvester (1873), L. R. 9 Q. B. 34; 43 L. J. Q. B. 1; and Ratcliffe *v.* Evans, [1892] 2 Q. B. 524; 61 L. J. Q. B. 535.

(*b*) See Adam *v.* Newbigging (1888), 13 App. Cas. 308; 57 L. J. Ch. 1066.

(*c*) (1883), 8 App. Cas. 467; 52 L. J. Q. B. 737.

(*d*) Schneider *v.* Heath (1813), 3 Camp. 506; 14 R. R. 825.

(*e*) Ward *v.* Hobbs (1878), 4 App. Cas. 13; 48 L. J. Q. B. 281; and see Fletcher *v.* Krell (1872), 42 L. J. Q. B. 55; 28 L. T. 105.

(*f*) 1 B. R. C. C. 440.

(*g*) (1838), 6 C. & F. 232; 49 R. R. 115.

(*h*) (1881), 20 Ch. D. 1; 51 L. J. Ch. 113.

(*i*) (1882), 10 Q. B. D. 295; 52 L. J. Q. B. 1.

Omission in particulars of sale at auction.

A dwelling-house and offices were put up for sale by public auction, under a printed condition in a common form, that the lot was sold subject to any existing rights and easements of whatever nature—and the printed particulars made no mention of any easement, or of any claim to an easement. As the result of evidence it appeared that the house was subject to an easement belonging to the owner of a neighbouring tenement to use the kitchen for particular purposes, and that the vendor's solicitor knew of the rumoured existence of some such easement, but forbore to make inquiries. No grant of an easement appeared from the abstract, and its existence was, in fact, disputed on the pleadings. In the auction room the plaintiff's solicitor said he had heard of some such claim, but had no definite information about it, and the auctioneer, in hearing of the plaintiff's solicitor, on being questioned, told the audience that they might dismiss the subject of the rumoured claims from their minds, as nobody would probably ever hear of them again. Held, that the conditions were misleading and the statements in the auction room insufficient, and specific performance of the contract was refused (*k*).

Marriage settlement.

In an action to set aside a marriage settlement, the plaintiff alleged as the ground of his action that, previous to the execution of the settlement made upon the marriage between himself and J. S., the latter stated to him that her first husband had been divorced from her at her suit, by reason of his cruelty and adultery, and that she had not herself been guilty of adultery; that such statements were made to induce him to execute the settlement and contract the marriage; that, in reliance on the representations, he executed the settlement and married J. S.; that he subsequently discovered that the representations were false to the knowledge of J. S., that she herself had been divorced from her husband at his suit and by reason of her adultery. Held, on motion by the defendant, that the plaintiff's statement of claim must be struck out under Ord. XXV. r. 4, as disclosing no reasonable ground of action (*l*).

An undesirable connection.

Where A. falsely represents that B. is his principal or partner or responsibly connected with him in a venture, and there is tangible probability of injury to the property of B. in consequence of such representation, B. is entitled to an injunction restraining the representation (*m*).

Concealment of fraud.

In an action to recover by way of damages money lost by the

(*k*) Heywood *v.* Mallalieu (1883), 25 Ch. D. 357; 53 L. J. Ch. 492.
(*l*) Johnston *v.* Johnston (1884), 53 L. J. Ch. 1014; 51 L. T. 537.
(*m*) Walter *v.* Ashton, [1902] 2 Ch. 282; 71 L. J. Ch. 839.

fraudulent representations of the defendant, a reply to a defence of the Statutes of Limitations, that the plaintiff did not discover and had not reasonable means of discovering the fraud within six years before action, and that the existence of such fraud was fraudulently concealed by the defendant until within such six years, was *held* good by the Court of Appeal (*n*). Statutes of Limitation.

The plaintiff may recover damages for any injury which is the direct and natural consequence of his acting on the faith of the defendant's fraudulent representations (*o*). In Twycross v. Grant (*p*), where the plaintiff had been induced by the fraud of the defendant to take up shares which were really worthless, he was held entitled to recover the full amount he had paid for them, although they had a market value at the time he took them. In Clarke *v.* Yorke (*q*) the question arose whether a plaintiff who had already obtained damages in the county court for false and fraudulent representations could bring an action in the High Court for further damages accrued since judgment in the county court. It was held, by Pearson, J., that he could not do this, as the cause of action was not continuing and his right of action was exhausted. Damages.

The common law action to recover damages for the infringement of a trade mark was based upon the ground of fraud (*r*). Trade marks and copyright.

But it is not now necessary—nor was it ever in equity—to prove fraud against a defendant in such a case (*s*). Fraud not essential.

At common law there was no copyright in literary productions *after publication*, but there was *before* (*t*). At common law.

(*n*) Gibbs *v.* Guild (1882), 9 Q. B. D. 59; 51 L. J. Q. B. 313. See also Ecclesiastical Commrs. for England *v.* North Eastern Ry. Co. (1877), 4 Ch. D. 845; 47 L. J. Ch. 20; observed upon, Barber *v.* Houston (1884), 14 L. R. Ir. 273; and Bulli Coal Mining Co. *v.* Osborne, [1899] A. C. 351; 68 L. J. P. C. 49; and see Betjemann *v.* Betjemann, [1895] 2 Ch. 474; 64 L. J. Ch. 641.

(*o*) Mullett *v.* Mason (1866), L. R. 1 C. P. 559; 35 L. J. C. P. 299.

(*p*) (1877), 2 C. P. D. 469; 46 L. J. C. P. 636.

(*q*) (1882), 47 L. T. 381; 31 W. R. 62. See also Evans *v.* Collins (1844), 5 Q. B. 820; 12 L. J. Q. B. 339; Pontifex *v.* Bignold (1841), 3 M. & G. 63; 3 Scott, N. R. 390; Cornfoot *v.* Fowke (1840), 6 M. & W. 358; 4 Jur. 919; Langridge *v.* Levy (1837), 2 M. & W. 519; Behn *v.* Burness (1863), 3 B. & S. 751; 32 L. J. Q. B. 204; Ormrod *v.* Huth (1845), 14 M. & W. 651; 14 L. J. Ex. 366; Sullivan *v.* Mitcalfe (1880), 5 C. P. D. 455; 49 L. J. C. P. 815; Eaglefield *v.* Londonderry (1876), 4 Ch. D. 693; and on appeal, 38 L. T. 303; Gover's case (1875), 1 Ch. D. 182; 45 L. J. Ch. 83; Cornell *v.* Hay (1873), L. R. 8 C. P. 328; 42 L. J. C. P. 136; Brett *v.* Clowser (1880), 5 C. P. D. 376; Jury *v.* Stoker (1882), L. R. Ir. 9 Ch. D. 385.

(*r*) Rogers *v.* Nowill (1847), 5 C. B. 109; 17 L. J. C. P. 52; Singer Co. *v.* Wilson (1876), 2 Ch. D. 434; 45 L. J. Ch. 490.

(*s*) 38 & 39 Vict. c. 91; 39 & 40 Vict. c. 33; 40 & 41 Vict. c. 37 (The Trade Marks Acts, 1875—1877).

(*t*) Albert, Prince *v.* Strange

By statute.

For the present law upon the subject of copyright, see for copyright in *books* 5 & 6 Vict. c. 45. Copyright in *designs*, 46 & 47 Vict. c. 57, s. 113. Copyright in *dramatic* productions, 3 & 4 Will. 4, c. 15, s. 1; 5 & 6 Vict. c. 45, ss. 2, 20, 22. Copyright in *musical* compositions, 45 & 46 Vict. c. 40. Copyright in *newspapers*, 44 & 45 Vict. c. 60. Copyright in *pictures*, 25 & 26 Vict. c. 68. See also the International Copyright Act, 1886 (49 & 50 Vict. c. 33); the Merchandise Marks Act, 1887 (50 & 51 Vict. c. 28); and the Musical (Summary Proceedings) Copyright Act, 1902 (2 Edw. 7, c. 15) (*u*).

The Court will not define in general terms what amounts to a literary composition which can be protected under the Copyright Acts (*x*).

Walter *v.* Lane.

It has been recently decided (*y*) that there is copyright in a report of a speech delivered in public, (in which the speaker claims no rights,) the words of the speaker being taken down in shorthand, and the notes being afterwards transcribed by the reporter and published in a newspaper. The reporter is the "author" of the report within the meaning of the Copyright Act, 1842 (5 & 6 Vict. c. 45).

Books.

The plaintiffs, who were upholsterers, published an illustrated catalogue of articles of furniture, which was duly registered under the Copyright Act as a book. The illustrations were engraved from original drawings made by artists employed by the plaintiffs, but the book contained no letterpress of such a description as to be the subject of copyright, and it was not published for sale, but was used by the plaintiffs as an advertisement. The defendants published an illustrated catalogue, many of the illustrations in which were copied from those in the plaintiffs' book. It was held that the plaintiffs were entitled to an injunction restraining the defendants from publishing any catalogue containing illustrations copied from the plaintiffs' book.

What is a book?

A collection of prints published together in a volume is a book within the meaning of the Copyright Acts and the proper subject of copyright, though it contains no such letterpress as could be the subject of copyright, and it makes no difference that the book is not published for sale, but only used as an advertisement [Cobbett *v.* Woodward (L. R. 14 Eq. 407) overruled] (*z*).

(1849), 1 Mac. & G. 25; 18 L. J. Ch. 120; Reade *v.* Conquest (1861), 9 C. B. N. S. 755; 30 L. J. C. P. 269.

(*u*) See *Ex parte* Francis, [1903] 1 K. B. 275; 72 L. J. K. B. 120.

(*x*) Chilton *v.* Progress Printing Co., [1895] 2 Ch. 29; 64 L. J. Ch. 510.

(*y*) Walter *v.* Lane, [1900] A. C. 539; 69 L. J. Ch. 699.

(*z*) Maple & Co. *v.* Junior Army and Navy Stores (1882), 21 Ch. D. 369; 52 L. J. Ch. 67. See also

In the case of Coote *v.* Judd (*a*) it was decided that registration of copyright is bad if the name entered as that of "the publisher" is not that of the first publisher. Where copyright belongs to A., it cannot be properly registered in the name of his nominee or agent unless the property is actually vested in such person as trustee for A. The conjunction in such a case of the unregistered proprietor as co-plaintiff with the improperly registered nominee or agent will not render an action for infringement sustainable (*b*). In an action for infringement of copyright, where objections to the registration are not delivered within the prescribed time, the action may nevertheless be dismissed if a defect in the registration is brought out from the plaintiff's evidence. First publisher.

As to the law relating to copyright in the title of a book, the case of Dicks *v.* Yates (*c*) should be referred to. Copyright in title of book.

The plaintiff, in Ager *v.* Peninsular and Oriental Steam Navigation Co. (*d*), published "The Standard Telegram Code," a book of words selected from eight languages, for use in telegraphic transmissions of messages, and it was accompanied by figure cyphers for reference or private interpretation. The book was registered under the Copyright Act, 5 & 6 Vict. c. 45. The defendants bought a copy of the book, and compiled for their own use with its aid a new and independent work, as alleged, which was their own private telegraph code, and they distributed copies of their book amongst their agents at home and abroad, but they had not printed their book for sale or exportation. It was decided that the defendants had infringed the copyright of the plaintiff, and that a perpetual injunction must be granted. Copyright to "code."

The registered proprietor of the copyright in a book, to whom a special action on the case against an infringer is given by sect. 15 of the Copyright Act, 1842 (*e*), is also entitled to bring an action against him under sect. 23 in detinue for the copies of the book retained, and also in trover for damages arising from the wrongful

Lamb *v.* Evans, [1893] 1 Ch. 218; 62 L. J. Ch. 404, where it was held that the headings of a trade directory under which trade advertisements are classified are the subject of copyright; and that the collocation and arrangement of the advertisements generally was, though each single advertisement was not, the subject of copyright; and Collis *v.* Cater (1898), 71 L. T. 613. As to railway guides, see Leslie *v.* Young, [1894] A. C. 335; 6 R. 211.

(*a*) (1883), 23 Ch. D. 727; 53 L. J. Ch. 36.

(*b*) Petty *v.* Taylor, [1897] 1 Ch. 465; 66 L. J. Ch. 209. See also London Printing and Publishing Alliance *v.* Cox, [1891] 3 Ch. 291; 60 L. J. Ch. 707.

(*c*) (1881), 18 Ch. D. 76; 50 L. J. Ch. 809.

(*d*) (1884), 26 Ch. D. 637; 53 L. J. Ch. 589; and see Cable *v.* Marks (1882), 52 L. J. Ch. 107; 47 L. T. 132.

(*e*) 5 & 6 Vict. c. 45.

conversion. The measure of damages will be the total amount realised by the sale of the books (*f*).

Public lecture, no right to verbatim publication.

An author and a lecturer upon various scientific subjects delivered from memory, though it was in manuscript, a lecture at the Working Men's College upon "The Dog as the Friend of Man." The audience were admitted to the room by tickets issued gratuitously by the committee of the college. P., the author of a system of shorthand writing, and the publisher of works intended for instruction in the art of shorthand writing, attended the lecture and took notes, nearly verbatim, in shorthand, of it, and afterwards published the lecture in his monthly periodical "The Phonographic Lecturer." The Court, on motion for an injunction to restrain the publication, decided that where a lecture of this kind is delivered to an audience limited and admitted by tickets, the understanding between the lecturer and the audience is that, whether the lecture has been committed to writing beforehand or not, the audience are quite at liberty to take the fullest notes for their own personal purposes, but they are not at liberty to use them afterwards for the purpose of publishing the lecture for profit; and the publication of the lecture in shorthand characters is not regarded as being different in any material sense from any other; and an injunction was accordingly granted (*g*).

Person aggrieved by entry.

Where a person shall deem himself aggrieved by any entry in the register of copyright, the Court will make an order varying such entry (*h*).

Face of barometer not a book.

In Davis *v.* Comitti (*i*), it was held that the face of a barometer displaying special letterpress was not capable of registration under the Copyright Act, 1842, as not being, within sect. 2, "*a book separately published.*"

Designs.

The law upon copyright in designs, as has been pointed out, is governed entirely by the Patents, Designs, and Trade Marks Act, 1883 (*k*), and the reader is referred to this statute for information upon this important branch of the law of copyright.

It may be observed that no one can properly register or retain on the register a trade mark for goods in which he does not deal,

(*f*) Muddock *v.* Blackwood, [1898] 1 Ch. 58; 67 L. J. Ch. 6.

(*g*) Nicols *v.* Pitman (1884), 26 Ch. D. 374; 53 L. J. Ch. 552; and see Abernethy *v.* Hutchinson (1825), 3 L. J. Ch. (O. S.) 209; 1 H. & T. 28; Caird *v.* Sime (1887), 12 App. Cas. 326; 57 L. J. P. C. 2; Merryweather *v.* Moore, [1892] 2 Ch. 518; 61 L. J. Ch. 505.

(*h*) *Ex parte* Poulton (1884), 53 L. J. Q. B. 320; and see *In re* Rivière & Co.'s Trade Mark (1884), 53 L. J. Ch. 578; 49 L. T. 504.

(*i*) (1885), 54 L. J. Ch. 419.

(*k*) 46 & 47 Vict. c. 57, s. 113. The whole of the cases on this subject are collected and discussed in Sebastian on Trade Marks, &c.,

and has not at the time of registration some definite and present intention to deal (*l*).

In Fielding *v.* Hawley (*m*), a butter dish, consisting of a dish and cover, is one "*article of manufacture*" within the Copyright (Designs) Act, 1842, and it is a sufficient compliance with the Act to stamp the registration mark upon the dish alone, though the cover was separate from and not in any way attached to the dish, and though the entire design was upon the cover, and protection is not denied even though in the process of manufacture the mark becomes illegible.

Sculpture.

It is provided by 54 Geo. 3, c. 56, s. 1, that every person who makes or causes to be made any new and original sculpture, model, copy, or cast of the human figure, or of any animal, or of any animal combined with the human figure, or of any subject being matter of invention in sculpture, is to have the sole right and property in such sculpture, model, copy, or cast for a term of fourteen years. It has been held (*n*) that new and original casts of fruit and leaves are within this section.

Dramatic productions and musical compositions.

The publication in this country of a dramatic piece as a book before it has been publicly represented or performed does not deprive the author of such dramatic piece or musical composition, or his assignee, of the exclusive right of representing or performing it (*o*). In another case the Court of Appeal decided that the person whose right under sect. 20 of 5 & 6 Vict. c. 45, to such sole liberty of representing a musical composition has been infringed is entitled to recover the penalty of 40*s.* given by sect. 2 of 3 & 4 Will. 4, c. 15, although such musical composition has not been represented at a place of dramatic entertainment (*p*).

A sheet of paper perforated so that, when it is placed in a

4th ed. (1889), to which reference should be made.

(*l*) *In re* Batt & Co.'s Trade Marks, [1898] 2 Ch. 432; 67 L. J. Ch. 576; affirmed, *sub nom.* Batt *v.* Dunnett, [1899] A. C. 428; 68 L. J. Ch. 557.

(*m*) (1883), 48 L. T. 639; 47 J. P. 582; and see Heath *v.* Rollason, [1898] A. C. 499; 67 L. J. Ch. 565. See also Hollinrake *v.* Truswell, [1893] 2 Ch. 377; 62 L. J. Ch. 613, where it was held that a cardboard pattern sleeve containing a scale for adapting it to sleeves of any dimensions was capable of copyright under 5 & 6 Vict. c. 45, as a chart or plan.

(*n*) Caproni *v.* Alberti (1892), 65 L. T. 785; 40 W. R. 235. See also Britain *v.* Hanks (1902), 86 L. T. 765, where it was held that metal models of mounted yeomen produced and sold as toys may be within the protection of the Act.

(*o*) Chappell *v.* Boosey (1882), 21 Ch. D. 232; 51 L. J. Ch. 625; and see Reade *v.* Conquest (1861), 9 C. B. N. S. 755; 30 L. J. C. P. 269.

(*p*) Wall *v.* Taylor (1883), 11 Q. B. D. 102; 52 L. J. Q. B. 558. See also Wall *v.* Martin, *ibid.*; and Fuller *v.* Blackpool Winter Gardens Co., [1895] 2 Q. B. 429; 73 L. T. 242.

mechanical instrument and made to pass under tubes through which air is forced, a copyright tune is reproduced, is not a copy of a sheet of music so as to constitute an infringement of the copyright within the meaning of the Copyright Act, 1842 (*q*).

"Our Boys" at the hospital.

An amateur dramatic club gave a performance of a copyright play at a hospital for the entertainment of the inmates. Admission was free; the governors of the hospital paid for the seats and costumes; tickets were given to members of the dramatic club to distribute among their friends, and some reporters for the theatrical newspapers attended. It was decided that the performance was not a performance in a "place of dramatic entertainment" within 3 & 4 Will. 4, c. 15, or 5 & 6 Vict. c. 45, s. 20, and that the performers were not liable to pay penalties to the owners of the copyright (*r*).

Newspapers.

A newspaper is within the Copyright Act (5 & 6 Vict. c. 45), and requires registration under that Act in order to give the proprietor the copyright in its contents, and so enable him to sue in respect of a piracy of any article therein. Also to enable the proprietor of a newspaper to sue in respect of a piracy of any article therein, he must show, not merely that the author of the article has been paid for his services, but that it has been composed on the terms that the copyright therein shall belong to such proprietor (*s*). The several proprietors, however, of several periodicals may jointly employ an author, so that the copyright in the article becomes vested in each after registration of his periodical, when he acquires the right to sue to restrain infringement (*t*).

The registration of the first number of a work published in serial parts is probably a sufficient registration of each of the succeeding parts (*u*).

Pictures.

In Nottage *v.* Jackson (*x*) it was decided that when a firm of

(*q*) Boosey *v.* Whight, [1900] 1 Ch. 122; 69 L. J. Ch. 63.

(*r*) Duck *v.* Bates (1884), 13 Q. B. D. 843; 53 L. J. Q. B. 338.

(*s*) Walter *v.* Howe (1881), 17 Ch. D. 708; 50 L. J. Ch. 621; Cox *v.* Land and Water Journal Co., not followed (1869), L. R. 9 Eq. 324; 39 L. J. Ch. 152; and see Walter *v.* Steinkopff, [1892] 3 Ch. 489; 61 L. J. Ch. 521; and Aflalo *v.* Lawrence, [1902] 1 Ch. 264; 70 L. J. Ch. 797; affirmed, [1903] 1 Ch. 318; 72 L. J. Ch. 107.

(*t*) Trade Auxiliary Co. *v.* Middlesbrough, &c. Association (1889), 40 Ch. D. 425; 58 L. J. Ch. 293; Cate *v.* Devon Newspaper Co. (1889), 40 Ch. D. 500; 58 L. J. Ch. 288.

(*u*) See Johnson *v.* Newnes, [1894] 3 Ch. 663; 63 L. J. Ch. 786.

(*x*) (1883), 11 Q. B. D. 627; 52 L. J. Q. B. 760. See also Pollard *v.* Photographic Co. (1888), 40 Ch. D. 345; 58 L. J. Ch. 251; Kenrick *v.* Lawrence (1890), 25 Q. B. D. 99; 38 W. R. 779; Melville *v.* Mirror of Life Co., [1895] 2 Ch. 531; 65 L. J. Ch. 41; considered in Boucas *v.* Cooke, [1903] 2 K. B. 227; 72 L. J. K. B. 741.

photographers send one of their artists to take a negative, he and not they is the author of the photograph. Two or more persons may be registered as "*authors*" of a painting, drawing, or photograph, but *quære* whether the copyright would subsist for the joint lives, or the lives and life of the author and seven years afterwards.

To constitute an infringement of the copyright of a painting under sect. 1 of the Copyright Act, 1862, the reproduction must be something which is itself in the nature of a picture. Accordingly a tableau vivant after a painting, so far as it consists of a merely temporary arrangement of living figures, is not a reproduction of the painting or the design thereof within the prohibition of the section (*y*). But a sketch of such a tableau published in an illustrated newspaper may, though the tableau does not, constitute an infringement of the copyright of the picture (*z*). Tableau vivant.

Trespass ab initio.

VAUX *v.* NEWMAN. (1611) [130]

(*Sometimes called the Six Carpenters' Case.*)

[8 Coke, 146.]

This case illustrates the law with reference to those cases wherein a person empowered by the authority of the law to do certain things, forfeits the protection which is given him by such authority by reason of the abuse of the privilege. The facts were as follows: Six carpenters entered a tavern "and did there buy and drink a quart of wine, and then paid for the same." They then gave a further order for "another quart of wine and a pennyworth of bread, amounting to 8*d*." This order was also

(*y*) Hanfstaengl *v.* Empire Palace (No. 1), [1894] 2 Ch. 1; 63 L. J. Ch. 417.

(*z*) Hanfstaengl *v.* Baines, [1895] A. C. 20; 64 L. J. Ch. 81.

fulfilled. For the second supply the men refused to pay. The question was, whether this non-payment made their original entry into the tavern tortious; in other words, whether it made them *trespassers ab initio*.

The Court held that the men did not become *trespassers ab initio* on the ground that mere *non-feasance* is not enough. In order to constitute trespass *ab initio* there must be two conditions. First, there must be *misfeasance* as distinguished from *non-feasance;* and secondly, the authority abused must be one given by *the law*, and not by an individual.

Who is trespasser *ab initio*.

The six carpenters abused an authority given them by the law. The law gives every man a right to enter an inn, and if these men had broken the glasses or actively done some illegal act they would have been guilty of *misfeasance* and have become trespassers *ab initio;* but they were only guilty of *non-feasance*, viz., of declining to pay for their beverage. They did not, therefore, fulfil the conditions essential to trespass *ab initio*. Instances of trespassers *ab initio* may be mentioned; the lessor who enters to view waste and *stays all night;* the commoner who enters to view his cattle *and cuts down a tree;* and the man who enters a tavern *and continues there all night against the will of the landlord*. In such cases that is *misfeasance*, and the authority is conferred by the law. The reason why *misfeasance* does not make a man a trespasser *ab initio* when the authority is conferred by an individual, would seem to be that those who voluntarily give powers can limit or recall them as they please, while the abuse of powers given by the law needs a more stringent protection.

Examples.

Distress for rent.

The power of a landlord to distrain his tenant's goods, when the latter will not pay rent, is authority given him *by law*, and had the legislature not intervened and otherwise provided, it would have followed as a corollary from the principles enunciated in the leading case that *misfeasance* in distraining would make a landlord a trespasser *ab initio*.

Such a result would, in many cases, obviously work great hardship, for in an action for illegal distress, where the defendant can be treated as a trespasser *ab initio*, so as to make his possession of the goods wholly wrongful (*a*), the entire value of the goods taken,

(*a*) Attack *v.* Bramwell (1863), 32 L. J. Q. B. 146; 3 B. & S. 520.

without deducting the rent satisfied by the seizure, will be recoverable, and not merely the actual damage sustained by the tenant. The plaintiff in such a case can claim to be placed in precisely the same position he was in before the trespass took place. A remedial statute (*b*) has, however, provided that where any distress is made for rent justly due, and an irregularity afterwards occurs on the part of the landlord, the distress is not on that account to be deemed unlawful, nor the persons making it trespassers *ab initio*. In such case the parties aggrieved may recover full satisfaction for the special damage they have sustained, but no more. Indeed, if no actual damage can be proved by the plaintiff (*c*) he has been held not entitled to nominal damages, although he may have established the fact of an irregularity.

11 Geo. 2, c. 19, s. 19.

A tenant under an agreement for a lease is liable to distress (*d*).

Excessive distress.

In Megson *v.* Mapleson (*e*), where a bailiff has levied excessive distress, a landlord may recover from him the amount he has had to pay to the injured tenant. Perhaps the most common form of irregularity is that known as excessive distress. By 52 Hen. 3, c. 4, it is enacted that they who take great and unreasonable distress shall be grievously amerced for the excess of such distresses. It is, however, observable that (*f*) no action is maintainable for distraining for more rent than is due, provided the distress is not excessive as to that which is due. Again, a frequent irregularity committed is that of selling the goods without subjecting them to the appraisement required by law, in which case the measure of damages is the value of the goods minus the rent due. Of course, it must not be assumed that a distress can never amount to a trespass *ab initio*. The statute relieves only when the distress is in itself regular and proper, though marred by a subsequent irregularity. Thus it has no application (*g*) where the distress is effected by breaking open an outer door, or (*h*) where it takes place between sunset and sunrise, or where the goods taken were not distrainable at all. Nor, again, where the distress is made after tender of the amount due; but tender after distress and before the goods are impounded makes their detention, but not the original taking, wrongful. And this is not because the statute steps in to relieve

(*b*) 11 Geo. 2, c. 19, s. 19; and as to distress for poor rate, see 17 Geo. 2, c. 38, s. 8. See also the Law of Distress Amendment Act, 1888 (51 & 52 Vict. c. 21), and the rules issued under sect. 8.

(*c*) Lucas *v.* Tarleton (1858), 27 L. J. Ex. 246; 3 H. & N. 116.

(*d*) Law Journal, Aug. 1883: Barrington *v.* Hamshaw.

(*e*) (1883), 49 L. T. 744.

(*f*) Tancred *v.* Leyland (1851), 16 Q. B. 669; 20 L. J. Q. B. 205.

(*g*) Brown *v.* Glenn (1851), 16 Q. B. 254; 20 L. J. Q. B. 205.

(*h*) Sutton *v.* Darke (1860), 29 L. J. Ex. 271.

the landlord, but because such detention is a mere non-feasance, and would not, therefore, even at common law, render the distress a trespass *ab initio*.

Cattle damage-feasant.

It will, too, be remarked that the statute is confined in its application to the case of distraint for rent, and in no way relates, for example, to the distress of cattle damage-feasant, so that the working or killing of such cattle would amount to a trespass *ab initio* on the part of him who had distrained them.

When an animal distrained as *damage-feasant* is impounded on private premises, and not in a common pound, a subsequent tender of sufficient compensation for the damage actually done is good, and if the distrainer, by demanding an excessive sum for damages as the condition of his release of the animal, obtains payment of such sum from the owner, such payment is not voluntary, and the sum paid may be recovered in an action for money had and received (*i*).

Wrongful eviction and apportionment.

A landlord who has wrongfully evicted his tenant between two quarter days is not entitled to the apportioned rent up to the day of eviction under the Apportionment Act, 1870 (*k*).

Trespass *ab initio* as to part.

A landlord may be a trespasser *ab initio* as to part of the things he distrains upon, and not as to the rest, as if there be a seizure of several chattels, some of which are by law seizable and others not, the seizure is illegal only as to the part which it was unlawful to seize. Thus, in one well-known case (*l*), a landlord distrained for rent, amongst other things, certain looms at work. As there was quite sufficient distress on the premises without these looms, they were not by law distrainable, so that so far as regards them the distress was clearly a trespass *ab initio*. The tenant paid the amount of the rent and the costs of the distress, which was then withdrawn. It was held that the seizure of the looms did not illegalise the whole proceeding, and that the tenant was entitled to receive only the actual damage sustained by the taking of those particular goods, and not the whole amount paid by him.

As to what goods are privileged from distress, see notes to Simpson *v.* Hartopp, *ante*, p. 340 *et seq.*

Forcible entry.

In connection with the subject-matter of this note, it is usual to refer to the position of a person having a right of possession in regard to his power of forcible entry on the land. Under an ancient statute (*m*), the assertion of his right, if accompanied by a breach of the peace, amounts to an indictable offence, but the

(*i*) Green *v.* Duckett (1883), 11 Q. B. D. 275; 52 L. J. Q. B. 435.

(*k*) Clapham *v.* Draper (1885), 1 C. & E. 484; and see Scott *v.* Brown (1884), 51 L. T. 746; *Ex parte* Sergeant, *In re* Sander (1885), 54 L. J. Q. B. 331; 52 L. T. 516.

(*l*) Harvey *v.* Pocock (1843), 11 M. & W. 740; 12 L. J. Ex. 434.

(*m*) 5 Rich. 2, stat. 1, c. 8.

statute does not create any civil remedy (*n*), so that damages cannot be recovered against a rightful owner for a forcible entry on his land. For any independent wrong, however (such as an assault or an injury to the furniture on the premises), committed in the course of the forcible entry (*o*), damages can be recovered even by a person whose possession was wrongful.

The reader is also referred to the cases of Thwaites *v.* Wilding (1883), 12 Q. B. D. 4; 53 L. J. Q. B. 1; Ness *v.* Stephenson (1882), 9 Q. B. D. 245; 47 J. P. 134; *Ex parte* Harris (1885), 34 W. R. 132.

Actions against Sheriffs, &c.

SEMAYNE *v.* GRESHAM. (1605) [131]

(*Sometimes called Semayne's Case.*)

[5 COKE, 91.]

Berisford and Gresham lived together in a house, of which they were joint tenants, in Blackfriars. Berisford plunged deeply into debt, and one of the largest and most pressing of his creditors was a Mr. Semayne, to whom he "acknowledged a recognizance in the nature of a statute staple." He then died, and, by right of survivorship, the ownership of the house in Blackfriars became vested in Gresham. Now, in that house were "divers goods" of the late Mr. Berisford, and to these, in virtue of the statute staple, Semayne considered himself entitled. Accordingly, he gave instructions to the sheriffs of London to go and do the best they could for him, and those functionaries, armed with the proper writ, set off for Blackfriars. But, when they came to the house, Gresham, who had an inkling

(*n*) Newton *v.* Harland (1840), 1 M. & G. 644; 1 Scott, N. R. 474.

(*o*) Beddall *v.* Maitland (1881), 17 Ch. D. 174; 50 L. J. Ch. 401.

of what they had come for, shut the door in their faces, "whereby they could not come and extend the said goods." It was for thus "disturbing the execution," and causing him to lose the benefit of his writ, that Semayne brought this action. He did not succeed, however, for the judges said Gresham had done nothing wrong in locking the door, and that, even when the king is a party, the householder must be requested to open the door before the sheriff can break his way in.

Houses as castles.

Semayne's case is the chief authority for the popular legal maxim which says that every Englishman's house is his castle—*domus sua est cuique tutissimum refugium*—a maxim which, in the lawless times from which our common law comes, was of the utmost importance, for what the law cannot do in that it is weak, a man must do for himself.

Process in civil suit.

This maxim, however, in common with almost every legal maxim, must be received with very considerable qualifications. Thus, a sheriff or other officer of the law empowered to execute process in a civil suit may, in pursuance of his duty, enter a man's private dwelling-house, although he would not be justified in breaking any outer door or window in order to effect an entrance into the house; and "when the king is a party," as, *e.g.*, in the case of the apprehension of a felon, the officer may enter the house as best he may by breaking the door or otherwise. It must, however, be carefully noted that no such breaking becomes justifiable until the officer, having given due notice of his business, and having demanded admission, has been refused to be allowed to enter the house.

Capturing felons.

The maxim, that "a man's house is his castle," only extends to his dwelling-house (*p*), and so does not apply, *e.g.*, to the case of a shop which is only used as a place of business (*q*).

Distress for rent.

Again, a landlord may enter upon the premises of a tenant who has not paid his rent, for the purpose of distraining the tenant's goods. This is, however, subject to certain restrictions, as, for instance, that the distress must take place after sunrise and before sunset. And so, too, although a barn, or outhouse, not connected with the dwelling-house, may be broken open in order to levy an

(*p*) Penton *v.* Browne (1663), 1 Keb. 698; 1 Sid. 186.

(*q*) Hodder *v.* Williams, [1895] 2 Q. B. 663; 65 L. J. Q. B. 70; and see American Must Co. *v.* Hendrey (1893), 62 L. J. Q. B. 388; 68 L. T. 742.

execution, yet it cannot be so broken in order to make a distress for rent (*r*). The distinction has been stated to be "between the powers of an officer acting in execution of legal process and the powers of a private individual who takes the law into his own hands and for his own purposes."

Recovery of land.

And, as will perhaps be readily supposed, when a house has been recovered by an action of ejectment, the sheriff may break the house and deliver possession to the plaintiff. For, after judgment, the defendant has no longer any right to retain possession of the house.

Sheltering friends.

Moreover, the rule that "every man's house is his castle" does not apply to protect it from invasion in case his friend, upon a pursuit, takes refuge there or removes his goods thither in order to avoid an execution. After demand of admission and refusal, the sheriff may break open the doors of the house for the purpose of executing the process of the law, but he does so at his peril, and, if it should turn out that his suspicions were not well founded, the act of breaking amounts to a trespass on his part (*s*). Indeed, it has been said that if the sheriff enters the house of a stranger, even through an open door, he does so at his peril, and, if the goods of which he is in search are not found there, he is a trespasser (*t*). It appears, then, that, although the sheriff cannot break the doors of one's house in the execution of a civil process against one's own goods, he may yet justify a breach for the purpose of seizing the goods of a stranger whose ordinary residence is elsewhere. A house, however, in which a man habitually resides would seem, on principle and on authority, to be on the same footing as his own house so far as executions are concerned, for it is there that one would naturally expect to find him and his goods. The sheriff, therefore, could not break the outer door of such a house to execute any process against the man's goods.

Sheriff breaking open door.

What is a breaking.

As to what is to be considered a *breaking* of the house, as distinguished from a mere *entry*, the cases are not altogether reconcileable. There are dicta and decisions which would lead to the conclusion that the opening of a door which is simply latched constitutes a breaking on the part of the sheriff; and so, too, if a window be shut, but not fastened, it may not be opened for the purpose of distraining (*u*). Where a pane in a window of the house happened

(*r*) Brown *v.* Glenn (1851), 16 Q. B. 254; 20 L. J. Q. B. 205.

(*s*) Cooke *v.* Birt (1814), 5 Taunt. 765; 1 Marsh. 333.

(*t*) Per Dallas, J., in Cooke *v.* Birt, *supra*.

(*u*) Nash *v.* Lucas (1867), L. R. 2 Q. B. 590; 8 B. & S. 531; Crabtree *v.* Robinson (1885), 15 Q. B. D. 312; 33 W. R. 936. See Long *v.* Clarke, [1894] 1 Q. B. 119; 63 L. J. Q. B. 108.

to be broken, it was held that the officer might lawfully put his hand through the aperture in order to make the arrest (*x*).

Execution good, though sheriff trespasser.

If the sheriff, in executing a writ, break the house, without authority of law for so doing, and thereby becomes a trespasser, it seems that the execution, nevertheless, is good, and that the injured party has no remedy save an action for trespass against the sheriff. This, at any rate, appears true in respect of an execution against goods. The execution creditor has done no wrong, and, therefore, so much of the sheriff's proceedings as was for his benefit should be considered valid, the rest illegal. An arrest of the person by means of an unlawful breaking has, however, been deemed to be altogether void (*y*), and there is authority for stating that, even in the case of an execution against goods, the Court may, in the exercise of its summary jurisdiction, and in order to prevent an abuse of its process, undo the whole of the proceedings (*z*) and set the execution aside.

When a sheriff who has seized goods under a writ of *fi. fa.* goes out of possession, the question whether in so doing he has abandoned possession or not is always a question of fact (*a*).

The property in goods seized under a writ of *fi. fa.* remains in the debtor till sale, but subject to the security of the execution creditor (*b*).

The reader is referred to the following cases having reference to sheriffs; they are too numerous to be dealt with at large in a book so limited as the present volume:—

Smith *v.* Keal (1882), 9 Q. B. D. 340; 47 L. T. 142. Liability of execution creditor for wrongful seizure under *fi. fa.*—Implied authority of solicitor—Direction to levy upon particular goods.

Royle *v.* Busby (1880), 6 Q. B. D. 171; 50 L. J. Q. B. 196. Sheriff's officer—Abortive execution—Possession money—Who liable to pay.

Hilliard *v.* Hanson (1882), 21 Ch. D. 69; 47 L. T. 342. Wrongful seizure—*Fi. fa.*—Injunction—Costs.

Ex parte Webster, *In re* Morris (1882), 22 Ch. D. 136; 52 L. J. Ch. 375. Costs on appeal from an interpleader order.

Aylwin *v.* Evans (1882), 52 L. J. Ch. 105; 47 L. T. 568. Restraining sale under *fi. fa.*

(*x*) Sandon *v.* Jervis (1858), E. B. & E. 935, 942; 28 L. J. Q. B. 156.

(*y*) Kerbey *v.* Denbey (1836), 1 M. & W. 336; 2 Gale, 31.

(*z*) See Smith's L. C. vol. i. p. 117 (11th ed.).

(*a*) Bagshawe's, Ltd. *v.* Deacon, [1898] 2 Q. B. 173; 67 L. J. Q. B. 658.

(*b*) *In re* Clarke, [1898] 1 Ch. 336; 67 L. J. Ch. 234.

Smith *v.* Darlow (1884), 26 Ch. D. 605; 53 L. J. Ch. 696. Interpleader—Possession money—Right of appeal.

In re Ludmore (1884), 13 Q. B. D. 415; 53 L. J. Q. B. 418. Poundage—Costs of execution.

Scarlett *v.* Hanson (1883), 12 Q. B. D. 213; 53 L. J. Q. B. 62. Seizure in execution—Equity of redemption—Duty of sheriff—Common Law Procedure Act, 1860, s. 13.

Harvey *v.* Harvey (1884), 26 Ch. D. 644; 51 L. T. 508. Duty in executing writ of attachment.

Ex parte Crosthwaite, *In re* Pearce (1885), 14 Q. B. D. 966; 54 L. J. Q. B. 316. Duties of sheriffs as to goods taken in execution.

Willis *v.* Combe (1884), 1 C. & E. 353. A sheriff is not liable for damage to goods, which he has seized under a *fi. fa.*, caused by a mob breaking in and injuring the goods, if he has used reasonable care and diligence respecting them.

Hunt *v.* Fenshawe (1883), 12 Q. B. D. 162; 32 W. R. 316. Court may order private sale of goods instead of public auction.

Kelly *v.* Browne (1883), 12 L. R. Ir. 348. False return—Levy—Cheques from debtor—Performance of condition.

Martin *v.* Tritton (1884), 1 C. & E. 226. Liability for seizure—Interpleader order rescinded.

Morris *v.* Salberg (1889), 22 Q. B. D. 614; 58 L. J. Q. B. 275. Direction to sheriff to levy on particular goods—Liability of execution creditor for wrongful seizure by sheriff.

Mitchell *v.* Simpson (1889), 23 Q. B. D. 373; 58 L. J. Q. B. 425. Sheriffs Act, 1887—Duty on commitment of debtor.

Ex parte Essex, *In re* Levy (1890), 63 L. T. 291; 38 W. R. 784. Right to possession money—Receiving order made before sale—Delay of sale.

Hogarth *v.* Jennings, [1892] 1 Q. B. 907; 61 L. J. Q. B. 601. Secretary of company not entitled to act as bailiff for the company.

Bagge *v.* Whitehead, [1892] 2 Q. B. 355; 61 L. J. Q. B. 778. Liability of sheriff for wrongful act of bailiff.

Trover, &c.

[132] ARMORY *v.* DELAMIRIE. (1722)

[1 Str. 504.]

A youthful chimney sweeper was fortunate enough to find a very valuable jewel, and he took it to a jeweller's to ascertain its value. The jeweller, taking advantage of the boy's simplicity, told him it was worthless, and offered him three halfpence for it, which the lad declined, and demanded his prize back. The jeweller refusing to return it, the boy went to law with him, and elicited from the judges a favourable decision.

"You have fairly found this jewel," they said, "and nobody except the real owner has a better title to it than yourself; till he shall appear, you may keep it against all the world, and maintain trover for it."

Finding not keeping.

There is very little truth in the time-honoured tradition that *finding is keeping*. The duty of the finder of a jewel, or other article, is to discover, if he can, the person who has lost it; and if he keeps it, knowing perfectly well who that person is, he commits a criminal offence.

Who may maintain an action for trover.

This note, however, is concerned with the case where the real owner of the thing found is not ascertainable, and the chief point on which Armory *v.* Delamirie is an authority is as to what is sufficient to enable a person to maintain an action for trover. On

Barker *v.* Furlong.

this point the case of Barker *v.* Furlong (*c*) should be considered. It was there held that trustees having a title to chattels with an immediate right of possession can sue in trover for the chattels, although they may never have taken actual possession, but have allowed the goods to remain in the possession of their *cestui que trust;* and although the title may be liable to be defeated by the claim of some third party, yet the wrongdoer cannot set up the title of that third party as a defence to an action against himself for the recovery of the goods. It is not merely the person in whom

(*c*) [1891] 2 Ch. 172; 60 L. J. Ch. 368.

resides the right of *property* who can maintain such an action. Armory had not that right. It continued in the person who had lost the jewel. All Armory had was the right of *possession;* but it was considered that that was quite a sufficient foundation for an action of trover as against a mere wrongdoer. And it may be stated generally that persons entitled to only a special property in goods, or to only a right of possession of the goods, may maintain an action of trover; such as a carrier, or a workman to whom goods have been sent to be repaired or worked upon, or a warehouse-keeper, who has them for safe custody, or an auctioneer or shop-keeper, to whom they have been sent to sell, and many others, to whom goods have been delivered for a special purpose (*d*). By way of illustration, the case of Nyberg *v.* Handelaar (*e*) may be mentioned. There the plaintiff was owner of a gold enamel box, and agreed with one Frankenheim that the latter should become owner of one-half of the box, but that the plaintiff should retain possession and have the selling of it. The box having remained some time in the hands of the plaintiff, he determined to sell it at Christie's Auction Rooms, and for that purpose handed it to Frankenheim, who, in turn, handed it to the defendant as security for money owing. The question was whether, under these circumstances, the plaintiff could maintain an action of detinue for the box. In giving judgment for the plaintiff, Fry, L. J., said: "I adhere to the statement made in the old books of practice that detinue can be maintained by any person who has the immediate right to possession of personal chattels which are wrongfully detained from him, whether that right arises out of an absolute or a special property."

Nyberg *v.* Handelaar.

The possessor of land is generally entitled, as against the finder, to chattels found on the land. In the recent case of South Staffordshire Water Co. *v.* Sharman (*f*), the defendant while cleaning out, under the plaintiffs' orders, a pool of water on their land, found two rings. He declined to deliver them to the plaintiffs, but failed to discover the real owner. In an action of detinue, it was held that the plaintiffs were entitled to the rings. "The case of Bridges *v.* Hawkesworth" (*g*), said Lord Russell, C. J., "stands by itself, and on special grounds, and on those grounds it seems to me that the decision in that case was right. Someone had accidentally

Chattels found on land.

(*d*) Williams *v.* Millington (1788), 1 H. Bl. 81; 2 R. R. 724; Colwell *v.* Reeves (1810), 2 Camp. 576; Martini *v.* Coles (1813), 1 M. & S. 140. This subject is fully dealt with in Addison's Law of Torts, pp. 498 *et seq.* (7th ed.).

(*e*) [1892] 2 Q. B. 202; 61 L. J. Q. B. 709.

(*f*) [1896] 2 Q. B. 44; 65 L. J. Q. B. 460.

(*g*) (1852), 21 L. J. Q. B. 75; 15 Jur. 1079.

dropped a bundle of bank-notes in a public shop. The shopkeeper did not know they had been dropped, and did not in any sense exercise control over them. The shop was open to the public, and they were invited to come there. A customer picked up the notes and gave them to the shopkeeper in order that he might advertise them. The owner of the notes was not found, and the finder then sought to recover them from the shopkeeper. It was held that he was entitled to do so, the *ground of the decision being*, as was pointed out by Patteson, J., *that the notes being dropped in the public part of the shop, were never in the custody of the shopkeeper, or 'within the protection of his house.'*" "It is somewhat strange," continued the learned Chief Justice, "that there is no more direct authority on the question; but the general principle seems to me to be that *where a person has possession of houses or land, with a manifest intention to exercise control over it and the things which may be upon or in it, then, if something is found on that land, whether by an employee of the owner or by a stranger, the presumption is that the possession of that thing is in the owner of the* locus in quo."

Possession nine-tenths of the law.

On the same principle (viz., that mere possession is sufficient as against a wrongdoer) rests a well-known rule in actions of ejectment, namely, that the plaintiff must recover by the strength of his own title, and not by the weakness of his opponent's. Possession, as the popular adage has it, is nine-tenths of the law.

Command can be denied.

It is on the same principle that the rule in pleading that *a command can be denied* rests. The position the person so pleading takes up is this: "Granted that the person you profess to represent has better right than I have, yet *you don't represent him;* he never told you, for instance, to come and take my cattle. I may not have a right against all the world, but I have a right against you" (*h*).

Jus tertii.

So a defendant in possession may set up a *jus tertii*—that is, the right of a third person—to the lands, to disprove the claimant's alleged right.

Spoilers.

Armory *v.* Delamirie also illustrates an important maxim of the law—*omnia præsumuntur contra spoliatorem;* that is to say, every presumption shall be made to the disadvantage of a wrongdoer (*i*). Delamirie refused to produce the stone when he gave back the socket, so it was presumed as against him to be the best kind of stone that would fit the socket. So, if a man withholds an agreement under which he is chargeable, it is presumed as against him

(*h*) Chambers *v.* Donaldson (1809), 11 East, 65; 10 R. R. 435; Dobree *v.* Napier (1836), 2 Bing. N. C. 781; 3 Scott, 201.

(*i*) Carter *v.* Bernard (1849), 13 Q. B. 945.

to have been properly stamped (*k*). A person once claimed a debt from another, the proof of which was to be found in certain documents which were sealed up and in his keeping. Without having any business to do so, he broke the seal and opened the bundle of documents. The Court did not in the least doubt that all the papers were before it, and did not doubt the justice of the claim, but the creditor's whole demand was disallowed *in odium spoliatoris*. So where a diamond necklace was missed, and part of it traced to the defendant, who could give no satisfactory account of how it came into his possession, it was held that the whole necklace might be presumed to have come into his hands so that he must pay the full value (*l*).

Respondeat superior.

A third point was decided in the leading case, viz., that "a master is answerable for the loss of a customer's property entrusted to his servant in the course of his business as a tradesman." The responsibility of a master for the torts of his servant will be found treated of under the leading case, Limpus *v.* London General Omnibus Co., *ante*, p. 507.

Sale in market overt.

The case of a sale in *market overt* may be dealt with here. It forms an exception to the rule that no one can acquire a title to a chattel personal from a person who has himself no title to it. A purchaser of chattels (not being a horse) in market overt acquires an indefeasible title to the chattels so purchased, provided he buys in good faith and without knowledge of any defect in the vendor's title (*m*); he may, accordingly, keep stolen goods so purchased. If, however, the thief is prosecuted to conviction, the tables are turned, an Act of Parliament (*n*) expressly providing that in that case the owner shall have his goods restored to him, notwithstanding any intermediate dealing with them; and, indeed, he may then maintain trover for them without waiting for any writ of restitution (*o*). But where goods have been obtained by fraud or other

(*k*) Crisp *v.* Anderson (1815), 1 Stark. 35; 18 R. R. 744.

(*l*) Mortimer *v.* Cradock (1843), 12 L. J. C. P. 166; 7 Jur. 45.

(*m*) Sale of Goods Act, 1893 (56 & 57 Vict. c. 71), s. 22.

(*n*) 24 & 25 Vict. c. 96, s. 100; and 56 & 57 Vict. c. 71, s. 24 (1); and see Moss *v.* Hancock, [1899] 2 Q. B. 111; 68 L. J. Q. B. 657; where it was held that a coin which is current coin of the realm may be sold as a *curiosity*, and in such a case, if the seller is a thief who has stolen it from the owner, and who has subsequently been prosecuted to conviction, an order for its restitution to the owner may be made under sect. 100 of the Larceny Act, 1861. But probably no such order could be made if the coin had been passed into circulation as current money, although it might be possible to identify it.

(*o*) Scattergood *v.* Sylvester (1850), 15 Q. B. 506; 19 L. J. Q. B. 447; and R. *v.* London (1869), L. R. 4 Q. B. 371; 10 B. & S. 341. See also Delaney *v.* Wallis (1884), 15 Cox. 525; 14 L. R. Ir. 31.

wrongful means not amounting to larceny, the property in such goods does not revest in the person who was the owner of the goods by reason only of the conviction of the offender (*p*). No action lies against an innocent purchaser of stolen goods in market overt who disposes of the goods before conviction of the thief (*q*). The innocent purchaser, it has been held, cannot, in answer to a claim for the goods by the owner after the thief has been duly convicted, counterclaim for the cost of their keep while in his possession (*r*). But by 30 & 31 Vict. c. 35, s. 9, the Court which tries the thief may, on his conviction, direct that money found on him shall be paid to the innocent buyer in compensation for his having to give up the property.

In the country the privilege of market overt applies only to those particular days and places which may happen to be specified by charter or prescription. But in London (*i.e.*, the *city*) it applies to every weekday (between sunrise and sunset), and every shop, but not to a wharf (*s*), nor a showroom over the shop to which customers are only admitted on special invitation (*t*). The sale, however, must be of such articles as are usually dealt in at the shop. Everything, too, must be open and above board; any attempt at concealment (*e.g.*, by the shutters being up, or by the sale taking place at the back of the shop) vitiating the privilege. Nor is the purchaser protected if it is Crown property that he buys, or if he is aware of the defect of title, or, in short, if he is guilty of any fraud in the transaction. The privilege of market overt covers only the sale from shopkeeper to stranger, and does not apply to a sale by a stranger to the shopkeeper (*u*).

Horses. The property in a horse, even though sold in market overt, does not pass to the buyer unless certain formalities prescribed by some

(*p*) 56 & 57 Vict. c. 71, s. 24 (2); overruling Bentley *v.* Vilmont (1887), 12 App. Cas. 471; 57 L. J. Q. B. 18; and *semble* restoring the law of Moyce *v.* Newington (1878), 4 Q. B. D. 32; 48 L. J. Q. B. 125; and in consequence repealing the Larceny and Summary Jurisdiction Acts so far as they are inconsistent. See also Lindsay *v.* Cundy (1878), 3 App. Cas. 459; 47 L. J. Q. B. 481; Babcock *v.* Lawson (1880), 5 Q. B. D. 284; 49 L. J. Q. B. 408; Reg. *v.* JJ. of Central Criminal Court (1886), 18 Q. B. D. 314; 16 Cox, C. C. 196; and Chichester *v.* Hill (1882), 48 L. T. 364; 15 Cox, C. C. 258.

(*q*) Horwood *v.* Smith (1788), 2 T. R. 750; 2 Leach, C. C. 586.

(*r*) Walker *v.* Matthews (1881), 8 Q. B. D. 109; 51 L. J. Q. B. 243.

(*s*) Wilkinson *v.* King (1806), 2 Camp. 335.

(*t*) Hargreave *v.* Spink, [1892] 1 Q. B. 25; 61 L. J. Q. B. 318.

(*u*) See Taylor *v.* Chambers (1605), Cro. Jac. 68; Lyons *v.* De Pass (1840), 11 A. & E. 326; 9 C. & P. 68; Crane *v.* London Dock Co. (1864), 5 B. & S. 313; 10 Jur. N. S. 984; and Hargreave *v.* Spink, *supra*.

ancient statutes (*x*) have been complied with. To entitle the buyer to anything approaching security, the horse must have been exposed in the open market for a whole hour between 10 a.m. and sunset. Then buyer, seller, and horse must all go together before the book-keeper of the market, who will enter in his note-book every kind of particular about all three. But even when the buyer has undergone this ordeal and paid the money, he can hardly call himself the owner of the horse, because any time within six months of its being stolen, the owner of a horse may put in his claim before a magistrate in the district where it is found, and if he can within forty days get two witnesses to come and swear it is his, may have it back again on tendering to the person in possession of it the sum he paid in market overt.

The stolen gig.

In the recent case of Winter *v.* Bancks (*y*), the facts were as follows: A gig was stolen from A., and it was afterwards found by the police in the possession of B. B. was indicted for larceny of the gig and acquitted. B., on his acquittal, wrote to the police officer in possession of the gig, demanding delivery of it to him, and A. afterwards, by letter and personally, applied to the police officer for its delivery over to him. The police officer, acting on the instruction of his superior officer, after giving notice to A. of his intention to do so, delivered the gig to B. as the person from whom it had been taken by the police. The Divisional Court held that the police officer so delivering it was liable in trover to A., who was found to be the true owner of the gig.

It is to be observed that goods stolen and sold *out of* market overt may be retaken wherever found, though no step has been taken, or is intended to be taken, to prosecute the thief (*z*). So also if goods stolen are pawned, the owner may maintain trover against the pawnbroker (*a*).

Recent cases on the subject of trover are:—

Johnson *v.* Hook (1883), 31 W. R. 812; 1 C. & E. 89. Measure of damages.

Delaney *v.* Wallis (1884), 14 L. R. Ir. 31, C. A.; 15 Cox, C. C. 525. Sale of stolen goods in market overt.

Tyler *v.* L. & S. W. Ry. Co. (1884), 1 C. & E. 285. Goods in custody of police.

Comité des Assureurs Maritimes *v.* Standard Bank of South

(*x*) 2 & 3 P. & M. c. 7, and 31 Eliz. c. 12.

(*y*) (1901), 84 L. T. 504; 49 W. R. 574.

(*z*) Peer *v.* Humphrey (1835), 2 A. & E. 495; 4 N. & M. 430.

(*a*) Packer *v.* Gillies (1806), 2 Camp. 336, n.; and see 35 & 36 Vict. c. 93 (Pawnbrokers Act, 1872), s. 36.

Africa (1883), 1 C. & E. 87. Right of owner to follow proceeds of sale.

Glyn, Mills, Currie & Co. *v.* East and West India Dock Co. (1882), 7 App. Cas. 591; 52 L. J. Q. B. 146. Liability of warehouseman to holders of bills of lading.

London and County Bank *v.* London and River Plate Bank (1888), 21 Q. B. D. 535; 57 L. J. Q. B. 601. Negotiable securities —holder for value.

Kleinwort *v.* Comptoir National D'Escompte de Paris, [1894] 2 Q. B. 157; 63 L. J. Q. B. 674. Dealing with crossed cheque wrongfully converted.

Henderson *v.* Williams, [1895] 1 Q. B. 521; 64 L. J. Q. B. 308. Liability of warehousemen. Estoppel of bailor.

La Cave *v.* Crédit Lyonnais, [1897] 1 Q. B. 148; 66 L. J. Q. B. 226.

Conversion.

[133] HILBERY *v.* HATTON. (1864)

[2 H. & C. 822; 33 L. J. Ex. 190.]

Hilbery, a Liverpool merchant, was the owner of the ship "John Brooks," which, in 1862, was chartered to take a cargo to Africa. The ship arrived off the coast of Africa, but unfortunately stranded there. The consignee of the cargo took possession of the vessel, and, without any authority, had her put up for sale. One Thompson, the agent of the defendants, some English merchants, finding her going cheaply, bought the ship for his principals, without knowing that the consignee had no business to sell her. The defendants, on being apprised by Thompson of what he had done, wrote back to him—"*You do not say from whom you bought her, nor whether you have the register with her. You had better for the present make a*

hulk of her." In an action by Hilbery, it was held that there was evidence of a conversion by the defendants, in spite of their circumspection.

This case is selected as illustrating *the severity with which the law views the intermeddling with another man's property*. The case of Kirk *v.* Gregory (*b*), where the defendant had removed some jewellery from the room of a dying man under the reasonable fear of its being stolen, may also be referred to. Hiort *v.* Bott (*c*) is also a good illustrative case. An ingenious scoundrel, named Grimmett, persuaded the defendant to indorse to him a delivery order for some barley, which he said had been sent to the defendant by mistake. In spite of his good intentions, which were simply to correct what he believed to be an error, the defendant was held liable. What constitutes conversion.

Since the Judicature Acts abolished the old forms of action, the distinction between "conversion" and "trespass" has become of little or no practical importance. Formerly there must have existed a right to immediate possession in order to found an action for trover; and an owner not entitled to immediate possession had to make use of a special action on the case for any injury to his interest in a chattel, and this means of redress was available, although the act complained of might also be a trespass, conversion, or breach of contract as against the person entitled to the immediate possession. "Conversion" has been defined (*d*) as "an unauthorised act which deprives another of his property permanently or for an indefinite time." The grievance is the unauthorised assumption of the powers and dominion of the true owner. Thus, if a man, who has no right to meddle with goods at all, removes them from one place to another, an action may be maintained against him for a trespass; but he is not guilty of a conversion of them, unless he removed the goods for the purpose of taking them away from the person entitled to them, or of exercising some control over them for the benefit of himself or of some other person (*e*).

The following are instances of conversion:—If a man has possession of my chattel and refuses to deliver it up, knowing or having the means of knowing that I am the owner of it (*f*); if a Examples.

(*b*) (1876), 1 Ex. D. 55; 45 L. J. Ex. 186.
(*c*) (1874), L. R. 9 Ex. 86; 43 L. J. Ex. 81.
(*d*) Per Bramwell, B., in Hiort *v.* Bott, *supra*.
(*e*) See Falke *v.* Fletcher (1865), 18 C. B. N. S. 403; 34 L. J. C. P. 146.
(*f*) Baldwin *v.* Cole (1705), 6

man, who is entrusted with the goods of another, puts them into the hands of a third person contrary to orders; if the pawnee of goods, with a power of sale, sells them before the day stipulated for the exercise of the power of sale has arrived (*g*); if a person, without my permission, takes my horse to ride, and leaves it at an inn (*h*); if a vendor who has sold goods on credit re-sells the goods before the day of payment has arrived (*i*); if a man takes the property of another without his consent, by abuse of the process of the law (*k*); or if a sheriff sells more goods than are sufficient to satisfy an execution, he is liable for a conversion in respect of the excess (*l*).

Where a hirer in possession of goods under a hire-and-purchase agreement sells them to a *bonâ fide* purchaser without notice before all instalments agreed upon are paid, and is prosecuted to conviction for larceny as a bailee, the owner can maintain an action for conversion against the purchaser (*m*).

Wrongful destruction.

So, too, the wilful and wrongful destruction of a chattel, or wilful and wrongful damage to it, whereby the owner is deprived of the use of it in its original state, is a conversion of it, if done by the wrongdoer with the intention of taking to himself the property in the chattel, or deriving some benefit from it, or with the intention of depriving the owner of the possession or use of it (*n*).

Servant obeying orders.

Every one who takes part in the wrongful conversion of another man's property is responsible, even though he is only a servant obeying his master's orders (*o*). "The only question is," said Lord Ellenborough in the case last referred to, "whether this is a conversion in the clerk which undoubtedly was so in the master. The clerk acted under an unavoidable ignorance and for his master's benefit when he sent the goods to his master; but nevertheless his acts may amount to a conversion; for a person is guilty of a

Mod. 212; Burroughes *v.* Bayne (1860), 5 H. & N. 296; 29 L. J. Ex. 185.

(*g*) Johnson *v.* Stear (1864), 15 C. B. N. S. 330; 33 L. J. C. P. 130; Pigot *v.* Cubley (1864), 15 C. B. N. S. 701; 33 L. J. C. P. 134.

(*h*) Syeds *v.* Hay (1791), 4 T. R. 264; 3 Burr. 1264.

(*i*) Chinery *v.* Viall (1860), 5 H. & N. 293; 29 L. J. Ex. 180; Martindale *v.* Smith (1841), 1 Q. B. 389; 1 G. & D. 1.

(*k*) Grainger *v.* Hill (1838), 4 Bing. N. C. 212; 5 Scott, 561.

(*l*) Aldred *v.* Constable (1844), 6 Q. B. 370; 8 Jur. 956.

(*m*) See and compare Helby *v.* Matthews, [1895] A. C. 471; 64 L. J. Ch. 465; Lee *v.* Butler, [1893] 2 Q. B. 318; 62 L. J. Q. B. 591; Shenstone *v.* Hilton, [1894] 2 Q. B. 452; 63 L. J. Q. B. 584; Payne *v.* Wilson, [1895] 2 Q. B. 537; 65 L. J. Q. B. 150; and Hull Ropes Co. *v.* Adams (1896), 65 L. J. Q. B. 114; 73 L. T. 446.

(*n*) See Richardson *v.* Atkinson (1724), 1 Str. 574; Simmons *v.* Lillystone (1853), 8 Exch. 431; 22 L. J. Ex. 217.

(*o*) Stephens *v.* Elwall (1815), 4 M. & S. 259; 16 R. R. 458.

conversion who intermeddles with my property, and disposes of it, and it is no answer that he acted under authority from another who had himself no authority to dispose of it. And the Court is governed by the principle of law, and not by the hardship of any particular case." The liability of auctioneers and of agents generally in respect of the wrongful conversion of goods depends upon whether they deal with the goods with the view of passing the property in them, or whether they merely settle the price or otherwise act as mere intermediaries between the supposed owner and the purchaser; in the former case they are liable, in the latter case they are not liable (*p*). Thus, in Cochrane *v.* Rymill (*q*), the owner of some cabs let them to a Mr. Peggs, cab-master, under a certain agreement. Peggs fraudulently got the defendant, an auctioneer, to sell them by auction. Though the auctioneer had thought all the time that the cabs belonged to Peggs, and had acted in a straightforward and correct manner, he was held liable in conversion to the true owner. "The defendant," said the Court, "had possession of these goods; he advertised them for sale; he sold them, and transferred the property in them, and therefore from beginning to end he had control over the property; and unless we are prepared to hold contrary to all the definitions of conversion which have been laid down, we must hold that such acts amount to conversion. But the auctioneer will not be held guilty of conversion if he *has not claimed to transfer the title nor purported to sell*, but has simply re-delivered the chattels to the person to whom the man from whom he received them told him to deliver them." Responsibility of auctioneer.

Where the conversion cannot be proved by any positive act, it may be inferred from proof of a *demand of the goods by the plaintiff, and a refusal to deliver them by the defendant*, he having the control over them at the time (*r*). Conversion proved by demand and refusal.

The owner of goods let to another for a term still continuing cannot maintain an action for conversion (*s*); but *any special or temporary ownership with immediate possession* is sufficient (*t*). Who may sue.

(*p*) Hollins *v.* Fowler (1875), L. R. 7 H. L. 757; 44 L. J. Q. B. 169; Barker *v.* Furlong, [1891] 2 Ch. 172; 60 L. J. Ch. 368; Consolidated Co. *v.* Curtis, [1892] 1 Q. B. 495; 61 L. J. Q. B. 325, in which Turner *v.* Hockey (1887), 56 L. J. Q. B. 301, was commented on; and see Winter *v.* Bancks (1901), 84 L. T. 504; 49 W. R. 574.

(*q*) (1879), 27 W. R. 777; *S. C.*, 40 L. T. 744. Compare with this case, National Mercantile Bank *v.* Rymill (1881), 44 L. T. 767.

(*r*) France *v.* Gaudet (1871), L. R. 6 Q. B. 199; 40 L. J. Q. B. 121; Philpott *v.* Kelley (1835), 3 A. & E. 106; 4 N. & M. 611.

(*s*) Gordon *v.* Harper (1796), 7 T. R. 9; 2 Esp. 465; and see Milgate *v.* Kebble (1841), 3 M. & G. 100; 3 Scott, N. R. 358.

(*t*) Legg *v.* Evans (1840), 6 M.

What may be sued for.

The action lies only in respect of *specific personal property;* therefore not for money unless identified in specie (*u*). In Bavins *v.* London and South Western Bank (*x*), the plaintiffs were the owners of an order in writing for payment of £69 7*s.*, provided that a receipt form at the foot thereof was duly signed. This receipt form was never duly signed. The order was stolen from the plaintiffs, and was negligently received by certain bankers for collection. The amount was attested by the bankers and credited to a customer in a running account. The Court of Appeal held that the plaintiffs could recover from the bankers the £69 7*s. as money had and received*, if not, as *damages in trover*.

The damages.

The measure of damages is, in general, the value of the goods. But this is not necessarily so, the damages being *compensation for the loss actually sustained* by the wrongful act (*y*).

Other cases.

The following cases on this subject may be consulted:—Spackman *v.* Foster, where title deeds of the plaintiffs were fraudulently taken from them and deposited by a third person, without their knowledge, with the defendant, in 1859, who held them, without knowledge of the fraud, to secure the repayment of a loan. The plaintiffs, on discovering the loss of the deeds in 1882, demanded them of the defendant, and upon his refusal to give them up brought an action to recover them, to which the defendant pleaded the Statute of Limitations. The Court held that, until demand and refusal to give up the deeds to the real owners, they had no right of action against which the statute would run (*y*). And see Hardman *v.* Booth (1863), 1 H. & C. 803; 32 L. J. Ex. 105; Cooper *v.* Chitty (1756), 1 Burr. 20; 1 Wm. Bl. 65; Mulliner *v.* Florence (1878), 3 Q. B. D. 484; 47 L. J. Q. B. 700; Jones *v.* Hough (1880), 5 Ex. D. 115; 49 L. J. Ex. 211; Fouldes *v.* Willoughby (1841), 8 M. & W. 540; 1 D. N. S. 86; Glyn *v.* E. & W. India Dock Co. (1882), 7 App. Cas. 591; 52 L. J. Q. B. 146; Lord *v.* Price (1874), L. R. 9 Ex. 54; 43 L. J. Ex. 49; Mathiessen *v.* London and County Bank (1879), 5 C. P. D. 7; 48 L. J. C. P. 529.

& W. 36; 8 D. C. P. 177; Brierly *v.* Kendall (1852), 17 Q. B. 937; 21 L. J. Q. B. 161.

(*u*) Orton *v.* Butler (1822), 5 B. & Ald. 652; and see Foster *v.* Green (1862), 31 L. J. Ex. 158.

(*x*) [1900] 1 Q. B. 270; 69 L. J. Q. B. 164.

(*y*) (1883), 11 Q. B. D. 99; 52 L. J. Q. B. 418; and see Hiort *v.* L. & N. W. Ry. Co. (1879), 4 Ex. D. 188; 48 L. J. Ex. 545; Chinery *v.* Viall (1860), 5 H. & N. 288; 29 L. J. Ex. 180; Livingstone *v.* Rawyard's Coal Co. (1880), 5 App. Cas. 25; 42 L. T. 334.

Defamation.

CAPITAL AND COUNTIES BANK *v.* HENTY. [134]
(1882)

[7 App. Cas. 741; 52 L. J. Q. B. 232.]

"Messrs. Henty and Sons hereby give notice that they will not receive in payment cheques drawn on any of the branches of the Capital and Counties Bank." The publication of a circular to this effect by some Chichester brewers caused a run on the bank, and an action for libel. But it was held that the circular was not libellous. "It seems to me unreasonable," said Brett, L. J., "that where there are a number of good interpretations, the only bad one should be seized upon to give a defamatory sense to the document."

Definition. Libel.

A libel may be defined as the malicious publication of untrue defamatory matter by writing, printing, or the like signs, without just cause or excuse.

Slander.

Slander consists of defamatory matter merely spoken.

Special damage.

An action for *libel* may always be brought when the words published expose the plaintiff to hatred, ridicule, or contempt, or are calculated to injure him in his business.

But, except in four cases, the plaintiff in an action for *slander* must prove *special damage*. The four exceptional cases are:—

(1.) Where the words charge the plaintiff with having committed some criminal offence.

(2.) Where they impute to him a contagious or infectious *disease*.

(3.) Where they are spoken of him as a professional or business man (*z*).

(4.) Where they impute unchastity or adultery to a woman or girl (*a*).

(*z*) See Dauncey *v.* Holloway, [1901] 2 K. B. 441; 70 L. J. K. B. 695.

(*a*) See the Slander of Women Act, 1891 (54 & 55 Vict. c. 51), which also provides that "in any action for words spoken and made actionable by this Act, a plaintiff shall not recover more costs than damages, unless the judge shall certify that there was reasonable ground for bringing the action."

In Riding *v.* Smith (*b*), it was held that a grocer and draper, whose wife helped him in the shop, could recover damages for slander charging her with having committed adultery on the premises, there being evidence of loss of custom not accounted for except by the slander.

In Webb *v.* Beavan (*c*), it was held that words imputing that a person has been guilty of a criminal offence will support an action for slander, without special damage, even though the criminal offence imputed is not indictable.

Slander on holders of public offices.

Words imputing want of integrity, dishonesty, or malversation to anyone holding a public office of confidence or trust, whether an office of profit or not, are actionable *per se* (*d*). On the other hand, when the words merely impute unsuitableness for the office, incompetency for want of ability, without ascribing any misconduct touching the office, then no action lies, when the office is honorary, without proof of special damage (*e*).

Malice.

Malice is not really necessary to the plaintiff's case (*f*).

Repetition of slander.

To repeat a slander is as actionable as to start it (*g*).

Innuendo.

When the words used are not actionable in themselves, but by reason of their intended meaning (*e.g.*, if used ironically), an innuendo must be laid, the questions whether the words are capable of the meaning alleged, and whether such meaning is actionable, being *for the Court*, and the question whether the words were used with the alleged meaning *for the jury* (*h*). But to constitute a libel, it is necessary, not only that the words should be susceptible of a libellous meaning, but that in the mind of a reasonable man they would constitute an imputation upon the person complaining (*i*).

Publication.

Publication to a third party must be proved. The mere sending a man an abusive letter contained in a fastened-up envelope is not actionable (*k*). It is the duty, however, of a person sending a letter

(*b*) (1876), 1 Ex. D. 91; 45 L. J. Ex. 281.

(*c*) (1883), 11 Q. B. D. 609; 52 L. J. Q. B. 544; and see Société Française des Asphaltes *v.* Farrell (1885), 1 C. & E. 563; Simmons *v.* Mitchell (1880), 6 App. Cas. 156; 53 L. J. P. C. 11; Weldon *v.* De Bathe (1884), 14 Q. B. D. 339; 54 L. J. Q. B. 113.

(*d*) Booth *v.* Arnold, [1895] 1 Q. B. 571; 64 L. J. Q. B. 443.

(*e*) Alexander *v.* Jenkins, [1892] 1 Q. B. 797; 61 L. J. Ch. 634.

(*f*) Bromage *v.* Prosser (1825), 4 B. & C. 247; 1 C. & P. 475.

(*g*) Watkin *v.* Hall (1868), L. R. 3 Q. B. 396; 37 L. J. Q. B. 125.

(*h*) Ruel *v.* Tatnell (1880), 43 L. T. 507; 29 W. R. 172; Simmons *v.* Mitchell, *ubi supra;* Williams *v.* Smith (1888), 22 Q. B. D. 134; 58 L. J. Q. B. 21; discussed in Searles *v.* Scarlett, [1892] 2 Q. B. 56; 61 L. J. Q. B. 573; and see the judgments in the leading case.

(*i*) Nevill *v.* Fine Arts Insurance Co., [1897] A. C. 68; 66 L. J. Q. B. 195.

(*k*) Phillips *v.* Jansen (1746), 2 Esp. 624; Peacock *v.* Reynal (1612),

which may be libellous to write it himself and mark it private, and if a copy be necessary to copy it himself, otherwise there is publication both to the clerks of the sender and the receiver (*l*).

Criticisms.

Depreciatory criticisms, not being false and malicious, by one tradesman on the goods of another are not actionable (*m*). And it has recently been held (*n*) that a statement by a trader that goods of his manufacture are superior to those manufactured by a rival trader, although untrue and made maliciously, is not actionable as a libel, nor does such a statement afford ground for an action for disparagement of goods, even if the plaintiff is damnified by it, and avers special damage. But if the words reflect upon the conduct of the trader's business, a good cause of action arises (*o*).

A "fair comment" upon a literary work, or other such production, submitted to the judgment of the public, that is to say, a comment which is the expression of honest opinion, and does not go beyond the limits of what may fairly be called criticism, is no libel, even although the comment be not such as a jury might think to be a just or reasonable appreciation of the work criticized. And if there is no evidence of anything beyond such a comment there is no case for the jury (*p*).

Truth.

Truth is a complete answer to a claim for damages for slander or libel.

Corporations.

A corporation may sue for a libel or slander affecting their property, but not for one merely affecting their personal reputation (*q*), but they may (probably) be sued in the same way as an individual.

2 Brown & Gould, 151; 16 M. & W. 825, n.; Wenhak *v.* Morgan (1888), 20 Q. B. D. 635; 57 L. J. Q. B. 241; but see Delacroix *v.* Thevenot (1817), 2 Stark. 63.

(*l*) Pulman *v.* Hill, [1891] 1 Q. B. 524; 60 L. J. Q. B. 299. This case was distinguished in Boxsius *v.* Goblet, [1894] 1 Q. B. 842; 63 L. J. Q. B. 401, where the occasion was held to be privileged as being a communication made by a solicitor to a third party in the discharge of his duty to his client; and see Baker *v.* Carrick, [1894] 1 Q. B. 838; 63 L. J. Q. B. 399; and Pedley *v.* Morris (1891), 61 L. J. Q. B. 21; 65 L. T. 526, where it was held that no action will lie against a solicitor for defamatory words contained in written objections lodged by him upon taxation of another solicitor's bill of costs.

(*m*) Young *v.* Macrae (1862), 3 B. & S. 264; 32 L. J. Q. B. 6; Harman *v.* Delaney (1718), 2 Str. 898; Evans *v.* Harlow (1844), 5 Q. B. 624; 13 L. J. Q. B. 130; W. Counties Manure Co. *v.* Lawes, &c. Co. (1874), L. R. 9 Ex. 218; 43 L. J. Ex. 171; and White *v.* Mellin, [1895] A. C. 154; 64 L. J. Ch. 308.

(*n*) Hubbuck *v.* Wilkinson, [1899] 1 Q. B. 86; 68 L. J. Q. B. 34.

(*o*) See Empire Typesetting Co. *v.* Linotype Co. (1898), 79 L. T. 8.

(*p*) McQuire *v.* Western Morning News Co., [1903] 2 K. B. 100; 72 L. J. K. B. 612.

(*q*) Mayor, &c. of Manchester *v.* Williams, [1891] 1 Q. B. 94; 60 L. J. Q. B. 23; South Hetton Coal Co. *v.* North Eastern News Association, [1894] 1 Q. B. 133; 63 L. J. Q. B. 293. Special damage need not be proved.

Injunction.

As to restraining libels by injunction, see Hill *v.* Hart-Davis (*r*), and Quartz, &c. Co. *v.* Beall (*s*).

In the recent case of Dockrell *v.* Dougall (*t*), the plaintiff, a medical man, made certain statements to the defendant, the owner of a certain medicinal liquid, as to his use of the liquid, without any view as to such statements being used to puff the sale of the liquid. Subsequently the defendant published these statements in the advertisement of the liquid. The plaintiff applied for an injunction to restrain this unauthorised use of his name, and gave evidence to show that such a use of it tended to injure him in his profession; but the jury having found that the advertisement was not libellous, the Court held that no action lay.

Evidence.

In an action for libel, evidence of the existence of rumours to the same effect as allegations in the libel is not admissible; nor is evidence of particular acts of misconduct on the part of the plaintiff; but general evidence of his reputation may probably be given in mitigation of damages (*u*).

Slander of title.

The action for slander of title, it may be mentioned here, is not strictly an action for defamation, but an action for special damage to the plaintiff by a false and malicious statement affecting his title to property, and it does not matter whether the words are written or spoken (*x*). In this connection the important judgment of the Court of Appeal, delivered by Bowen, L. J., in Ratcliffe *v.* Evans (*y*), should be considered. "That an action will lie," said that learned judge, "for written or oral falsehoods, not actionable *per se* nor even defamatory when they are maliciously published, where they are calculated in the ordinary course of things to produce, and where they do produce, actual damage, is established law. Such an action is not one of libel or of slander, but an action on the case for damage wilfully and intentionally done without just occasion or excuse, analogous to an action for slander of title.

(*r*) (1882), 21 Ch. D. 798; 51 L. J. Ch. 845.

(*s*) (1882), 20 Ch. D. 501; 51 L. J. Ch. 874; and see Liverpool Household Stores Association *v.* Smith (1887), 37 Ch. D. 170; 57 L. J. Ch. 85; Bonnard *v.* Perryman, [1891] 2 Ch. 269; 60 L. J. Ch. 617; Salomons *v.* Knight, [1891] 2 Ch. 294; 60 L. J. Ch. 743; Collard *v.* Marshall, [1892] 1 Ch. 571; 61 L. J. Ch. 268; and Monson *v.* Tussaud, [1894] 1 Q. B. 671; 63 L. J. Q. B. 454.

(*t*) (1898), 78 L. T. 840.

(*u*) Scott *v.* Sampson (1882), 8 Q. B. D. 491; 51 L. J. Q. B. 380; and see Wood *v.* Durham (1888), 21 Q. B. D. 501; 57 L. J. Q. B. 547.

(*x*) Malachy *v.* Soper (1836), 3 Bing. N. C. 371; 3 Scott, 723; Brook *v.* Rawl (1849), 4 Ex. 521; 19 L. J. Ex. 114; Wren *v.* Weild (1869), L. R. 4 Q. B. 730; 20 L. T. 277.

(*y*) [1892] 2 Q. B. 524; 61 L. J. Q. B. 535; distinguished in Ajello *v.* Worsley, [1898] 1 Ch. 274; 67 L. J. Ch. 172.

To support it, actual damage must be shown, for it is an action which only lies in respect of such damage as has actually occurred. . . . The character of the acts themselves which produce the damage, and the circumstances under which these acts are done, must regulate the degree of certainty and particularity with which the damage done ought to be stated and proved."

For the law of libel relative to newspapers, see the Newspaper Libel and Registration Act, 1881, and the Law of Libel Amendment Act, 1888 (*z*). Newspapers.

In Chamberlain *v.* Boyd (*a*), the plaintiff was a candidate for membership of the Reform Club, but upon a ballot of the members was not elected. A meeting of the members was called to consider an alteration of the rules regulating the election of members. The defendant falsely and maliciously spoke and published of the plaintiff as follows:—"The conduct of the" plaintiff "was so bad at a club in Melbourne, that a round robin was signed urging the committee to expel" him; "as, however," he was "there only for a short time the committee did not proceed further;" whereby the defendant induced a majority of the members of the club to retain the regulations under which the plaintiff had been rejected, and thereby prevented the plaintiff from again seeking to be elected to the club. It was decided upon demurrer that the claim disclosed no cause of action, for the words complained of, not being actionable in themselves, must be supported by special damage in order to enable the plaintiff to sue; and the damage alleged was not pecuniary or capable of being estimated in money, and was not the natural and probable consequence of the defendant's words.

As to the consolidation of several actions against different defendants in respect of the same or substantially the same libel, see section 5 of the Act of 1888 (*b*). Consolidation of actions.

When a master and his servant are both liable to an action for libel in respect of matter published by the servant in the master's newspaper, and the action is brought against the servant only, the master is entitled to undertake the defence of the servant (*c*). Master and servant.

In assessing damages the jury are entitled to take into considera- Damages.

(*z*) 44 & 45 Vict. c. 60; 51 & 52 Vict. c. 64; and see McQuire *v.* Western Morning News Co., *supra*.

(*a*) (1883), 11 Q. B. D. 407; 52 L. J. Q. B. 277; and see Jacobs *v.* Schmaltz (1890), 62 L. T. 121.

(*b*) 51 & 52 Vict. c. 64; and see Stone *v.* Press Association, [1897] 2 Q. B. 159; 66 L. J. Q. B. 662.

(*c*) Breay *v.* Royal British Nurses' Association, [1897] 2 Ch. 272; 66 L. J. Ch. 587.

tion the whole conduct of the defendant in the matter from the time the libel was published down to the time their verdict is given (*d*).

The Court has power to restrain a person from making slanderous statements, whether oral or written, calculated to injure the business of another (*e*).

Newsvendors.

The vendor of a newspaper in the ordinary course of his business, though he is *primâ facie* liable for a libel contained in it, is not liable if he can prove that he did not know that it contained a libel; that his ignorance was not due to any negligence on his own part; and that he did not know, and had no ground for supposing that the newspaper was likely to contain libellous matter. If he can prove these facts he is not a publisher of the libel (*f*). This rule was recently applied (*g*) in an action brought against the proprietors of a circulating library to recover damages for a libel contained in a book circulated by them in the ordinary course of their business; and it was held that in order to escape their *primâ facie* liability as publishers of the libel, the burden of proof was upon the defendants to show that it was not by any negligence on their part that they did not know that the book contained a libel. As to the question of admitting as evidence other parts of a newspaper to show in what sense the words constituting the alleged libel were used, see Bolton *v.* O'Brien (*h*).

Circulating library.

Criminal information.

For the law upon criminal informations for libel, see Reg. *v.* Yates (*i*).

Particulars.

As to particulars, see Bradbury *v.* Cooper (*k*).

(*d*) Praed *v.* Graham (1889), 24 Q. B. D. 53; 59 L. J. Q. B. 230.

(*e*) Hermann Loog *v.* Bean (1884), 26 Ch. D. 306; 53 L. J. Ch. 1128.

(*f*) Emmens *v.* Pottle (1885), 16 Q. B. D. 354; 55 L. J. Q. B. 51.

(*g*) Vizetelly *v.* Mudie's Select Library, [1900] 2 Q. B. 170; 69 L. J. Q. B. 645.

(*h*) (1885), 16 L. R. Ir. 97.

(*i*) (1885), 14 Q. B. D. 648; 54 L. J. Q. B. 258. The following cases may also be referred to, namely: Reg. *v.* Ramsey (1883), 15 Cox, C. C. 231; 48 L. T. 733; Reg. *v.* Labouchere (1884), 12 Q. B. D. 320; 53 L. J. Q. B. 362; Reg. *v.* London (1886), 16 Q. B. D. 772; 16 Cox, C. C. 81; Boaler *v.* Reg. (1888), 21 Q. B. D. 284; 16 Cox, C. C. 488; Reg. *v.* Adams (1888), 22 Q. B. D. 66; 16 Cox, C. C. 544; Reg. *v.* Munslow, [1895] 1 Q. B. 758; 64 L. J. M. C. 138.

(*k*) (1883), 12 Q. B. D. 94; 53 L. J. Q. B. 558.

Privileged Communications.

HARRISON *v.* BUSH. (1855) [135]

[5 E. & B. 344; 25 L. J. Q. B. 25.]

At Frome, in Somersetshire, there was a contested election, with the usual amount of excitement and party feeling. After it was over, Mr. Bush, an elector of Frome, wrote a letter to Lord Palmerston, who was then Home Secretary, complaining of the conduct of one of the local magistrates during the election, and saying that he had been stirring up and encouraging sedition, instead of putting it down with a strong hand. The magistrate brought this action for libel, but, as Mr. Bush had written his letter with the best intentions and in the discharge of what he considered to be a public duty, the plaintiff was not successful (*l*).

A man must always discharge his duty to society and himself, notwithstanding that it may involve the employment of harsh speech or writing concerning his neighbours; and therefore such speech or writing, even though it happens not to be true, is *privileged*.

The privilege may be *absolute* or *conditional*.

Absolute or conditional.

Speeches in Parliament (*m*), or in a law Court (*n*), communica-

(*l*) See Brown *v.* Houston, [1901] 2 K. B. 855; 70 L. J. K. B. 902.

(*m*) R. *v.* Abingdon (1794), 1 Esp. 227; 1 Peake, 310; Davison *v.* Duncan (1857), 7 E. & B. 229; 26 L. J. Q. B. 104; Goffin *v.* Donnelly (1891), 6 Q. B. D. 307; 50 L. J. Q. B. 303; Davis *v.* Shepstone (1886), 11 App. Cas. 187; 55 L. J. P. C. 51.

(*n*) Scott *v.* Stansfield (1868), L. R. 3 Ex. 220; 37 L. J. Ex. 155; Mackay *v.* Ford (1860), 5 H. & N. 792; 29 L. J. Ex. 404; Munster *v.* Lamb (1883), 11 Q. B. D. 588; 52 L. J. Q. B. 726; dissenting from Kendillon *v.* Maltby (1842), C. & M. 402; 2 M. & R. 438; and Anderson *v.* Gorrie, [1895] 1 Q. B. 668; 71 L. T. 382, where it was held that no action lies against a judge of a Court of Record in respect of any act done by him in his judicial capacity, even though he acted oppressively and maliciously, to the prejudice of the plaintiff, and to the perversion of justice. And it has recently been held that a justice of the peace, or other judicial authority,

tions relating to state matters made by one officer of state to another in the course of his official duty (*o*), are *absolutely* privileged. So, too, are the statements of witnesses, however irrelevant (*p*).

Duty or interest.

Ordinary communications, however, are not privileged *absolutely*, but only *primâ facie;* and the rule is that *wherever one person having an interest to protect, or a legal or moral duty to perform, makes a communication to another, such other having a corresponding interest or duty, this communication is primâ facie privileged* (*q*). If, for example, a person of indifferent character were to try to get elected into a respectable club, a member who knew something of his antecedents would be justified in making to the committee, or to another member, such a communication as would insure his being duly pilled. So, too, a master who parts with a servant is justified in telling a person who, with a view to employing the man, inquires about his character, that he is a thief or a drunkard (*r*).

Hunt *v.* G. N. Ry. Co.

In Hunt *v.* G. N. Ry. Co. (*s*), the defendants dismissed a servant for alleged negligence, and published his name, offence, and dismissal in a monthly list of punishments for serious offences, which was exhibited in the rooms occupied by their staff throughout their system. In an action by the dismissed servant against the company to recover damages for libel, it was held that, as the company had an interest in informing their servants, and the servants a corresponding interest in learning, that negligence would be followed by dismissal, the occasion of the publication was privileged.

Waller *v.* Loch.

In Waller *v.* Loch (*t*), the plaintiff was the daughter of a deceased officer in the army, and was in distressed circumstances. A subscription list was started for her, and she would have made a

to whom an application is made, under the Larceny Act, 1890 (53 & 54 Vict. c. 5), on a petition for an order for the reception and detention of a lunatic, is acting judicially, and consequently defamatory statements made in the course of the proceedings are not actionable: Hodson *v.* Pare, [1899] 1 Q. B. 455; 68 L. J. Q. B. 309.

(*o*) Chatterton *v.* Secretary of State for India in Council, [1895] 2 Q. B. 189; 64 L. J. Q. B. 676.

(*p*) Seaman *v.* Netherclift (1876), 2 C. P. D. 53; 48 L. J. C. P. 128; Dawkins *v.* Rokeby (1875), L. R. 7 H. L. 744; 45 L. J. Q. B. 8; Goffin *v.* Donnelly, *ubi supra.*

(*q*) See Hebditch *v.* MacIlwaine, [1894] 2 Q. B. 54; 63 L. J. Q. B. 587, where it was held that it is not sufficient to make the occasion privileged for the utterer of the defamatory statement honestly to believe that the person to whom he utters it has the necessary interest or duty if such is not really the fact.

(*r*) See Davies *v.* Snead (1870), L. R. 5 Q. B. 608; 39 L. J. Q. B. 202; Webb *v.* East (1880), 5 Ex. D. 108; 49 L. J. Ex. 250.

(*s*) [1891] 2 Q. B. 189; 60 L. J. Q. B. 498.

(*t*) (1881), 7 Q. B. D. 619; 51 L. J. Q. B. 274; Stuart *v.* Bell, [1891] 2 Q. B. 341; 60 L. J. Q. B. 577.

good hatful out of it if somebody, a friend of one of the intending subscribers, had not written to the Charity Organisation Society, of which the defendant was the secretary, for information about her. The society's report was unfavourable,—the lady was an impostor, it said, and a begging-letter writer who lived extravagantly while she was appealing for charity. This report was held to be a privileged communication. "A duty of imperfect obligation," said Cotton, L. J., "attaches on everyone to do what is for the good of society. In that sense it is the duty of those who have knowledge as to persons seeking charitable relief to communicate it when asked by persons who wish to know whether the applicants are deserving objects."

County councillor.

A county councillor making a defamatory statement at a meeting of the council held for the purpose of hearing applications for music and dancing licences with regard to a person applying for a licence, is not entitled to absolute immunity from liability, but only to the ordinary privilege which applies to a communication made without express malice on a privileged occasion. And this privilege may be rebutted by showing that, from some indirect motive, such as anger or gross and unreasoning prejudice with regard to a particular subject-matter, the defendant stated what he did not know to be true, reckless whether it was true or false (*u*).

Chief constable.

A report written and published by a chief constable under the direction of the Watch Committee of a municipal corporation has been held entitled to privilege (*x*).

Where an action of libel is brought in respect of a comment on a matter of public interest, the case is not one of privilege, properly so called, and actual malice need not be proved; the question is whether the comment does or does not go beyond the limits of fair criticism (*y*).

Don't tell everybody.

But even in those cases where a man has a right to make a communication affecting another's character, *he must take care to make it to the proper person*. He will not be protected against the unpleasant consequences of an action for slander if, as a worthy draper in the Harrow Road did, he goes about telling everybody he meets that So-and-so has been robbing him (*z*).

(*u*) See Royal Aquarium *v.* Parkinson, [1892] 1 Q. B. 431; 61 L. J. Q. B. 409.

(*x*) Andrews *v.* Nott-Bower, [1895] 1 Q. B. 888; 64 L. J. Q. B. 536.

(*y*) Merivale *v.* Carson (1887), 20 Q. B. D. 275; 58 L. T. 331. As to what is a "matter of public interest," see South Hetton Coal Co. *v.* North Eastern News Association, [1894] 1 Q. B. 133; 63 L. J. Q. B. 293.

(*z*) Harrison *v.* Fraser (1881), 29 W. R. 652; and see Toogood *v.* Spyring (1834), 1 C. M. & R. 181; 4 Tyr. 582; Tompson *v.* Dashwood (1883), 11 Q. B. D. 43;

Express malice destroys privilege.

Privilege, moreover, is not more than a presumption. It is open to the plaintiff to give proof of *express malice*, and show that the defendant's professed zeal for the public, or the urgent necessity of protecting his interests, is all pretence, and that he really has no other object than to injure the plaintiff (*a*). But where the judge rules that the occasion is privileged, nothing short of evidence of malice will displace the privilege (*b*).

Judge and jury.

Privilege or not, is a question *for the judge;* but express malice or not, is *for the jury* (*c*).

Searles *v.* Scarlett.

An interesting case on privilege recently came before the Court of Appeal in Searles *v.* Scarlett (*d*). The defendant published in a trade journal, under the heading "Extracts from the register of County Courts Judgments," a statement that a county court judgment had been obtained against the plaintiff for a certain amount on a certain day, but immediately under the heading was appended a note to the effect that judgments contained in the list might have been satisfied. The judgment had, in fact, been obtained against the plaintiff, who had satisfied it by payment a few days subsequently, but such satisfaction had not been entered upon the register. In an action for libel, the plaintiff was non-suited, the Court holding that the statement was published on a privileged occasion, and that there was an absence of evidence of express malice on the part of the defendant.

Church architecture.

Another case which may be referred to is that of Botterill *v.* Whytehead (*e*). It having been determined to restore Skirlough Church, an ancient Gothic edifice near Hull, the committee were thinking of putting the work in the hands of Botterill & Co., some Hull architects, when they received a memorial from the defendant, a clergyman, a resident in the neighbourhood, and a member of the Society for the Protection of Ancient Buildings and Monuments, recommending them not to do so, as Botterill & Co. were Wesleyans and knew nothing about Church architecture. It was considered

52 L. J. Q. B. 425, where the letter was sent to the wrong person, but was held privileged, as it would have been had it been correctly forwarded; Reg. *v.* Perry (1883), 15 Cox, C. C. 169; Hayward *v.* Hayward (1886), 34 Ch. D. 198; 56 L. J. Ch. 287.

(*a*) Clark *v.* Molyneux (1877), 3 Q. B. D. 237; 47 L. J. Q. B. 230; approved in Jenoure *v.* Delmege, [1891] A. C. 73; 60 L. J. P. C. 11, which also decided that no distinction can be drawn between one class of privileged communications and another; they all imply that the occasion rebuts the inference that the defendant is actuated by *mala fides*, and casts the burden of proving malice on the plaintiff.

(*b*) See Nevill *v.* Fine Arts Ins. Co., [1897] A. C. 68; 66 L. J. Q. B. 195.

(*c*) Cooke *v.* Wildes (1855), 5 E. & B. 328; 24 L. J. Q. B. 367.

(*d*) [1892] 2 Q. B. 56; 61 L. J. Q. B. 573.

(*e*) (1880), 41 L. T. 588.

that this letter of the æsthetic clergyman was not entitled to any particular privilege, and the architects were allowed to keep the verdict with substantial damages which the jury had given them.

Newspapers.

The fair reports of newspapers are privileged. But in Stevens *v.* Sampson (*f*), it was held that a true report of the proceedings in a court of justice sent to a newspaper *by a person who is not a reporter on the staff of the newspaper* is not privileged absolutely, and that if it be sent from a malicious motive an action will lie. By the Law of Libel Amendment Act, 1888 (*g*), it is provided that "A fair and accurate report in any newspaper of proceedings publicly heard before any Court exercising judicial authority shall, if published contemporaneously with such proceedings, be privileged: Provided that nothing in this section shall authorize the publication of any blasphemous or indecent matter." (Sect. 3.) (*h*)

Newspaper reports of proceedings in Court privileged.

Newspaper reports of proceedings of public meetings and of certain bodies and persons privileged.

A fair and accurate report published in any newspaper of the proceedings of a public meeting, or (except where neither the public nor any newspaper reporter is admitted) of any meeting of a vestry, town council, school board, board of guardians, board or local authority formed or constituted under the provisions of any Act of Parliament, or of any committee appointed by any of the above-mentioned bodies, or of any meeting of any commissioners authorized to act by letters patent, Act of Parliament, warrant under the Royal Sign Manual, or other lawful warrant or authority, select committees of either House of Parliament, justice of the peace in quarter sessions assembled for administrative or deliberative purposes, and the publication at the request of any Government office or department, officer of state, commissioner of police, or chief constable of any notice or report issued by them for the information of the public, shall be privileged, unless it shall be proved that such report or publication was published or made maliciously: Provided that nothing in this section shall authorize the publication of any blasphemous or indecent matter: Provided also, that the protection intended to be afforded by this section shall not be available as a defence in any proceedings if it shall be proved that the defendant has been requested to insert in the newspaper in which the report

(*f*) (1879), 5 Ex. D. 53; 49 L. J. Q. B. 120. See also Macdougall *v.* Knight (1889), 14 App. Cas. 194; 58 L. J. Q. B. 537; (1890), 25 Q. B. D. 1; 59 L. J. Q. B. 517.

(*g*) 51 & 52 Vict. c. 64. An order of a judge at chambers is now necessary before criminal proceedings can be commenced against a person responsible for the publication of a newspaper for any libel published therein (sect. 8). And there is no appeal from such an order; see *Ex parte* Pulbrook, [1892] 1 Q. B. 86; 61 L. J. M. C. 91.

(*h*) Kimber *v.* Press Association, [1893] 1 Q. B. 65; 62 L. J. Q. B. 152.

or other publication complained of appeared a reasonable letter or statement by way of contradiction or explanation of such report or other publication, and has refused or neglected to insert the same: Provided further, that nothing in this section contained shall be deemed or construed to limit or abridge any privilege now by law existing, or to protect the publication of any matter not of public concern and the publication of which is not for the public benefit. For the purposes of this section "public meeting" shall mean any meeting *bonâ fide* and lawfully held for a lawful purpose, and for the furtherance or discussion of any matter of public concern, whether the admission thereto be general or restricted. (Sect. 4.)

Power to defendant to give certain evidence in mitigation of damages.

At the trial of an action for a libel contained in any newspaper the defendant shall be at liberty to give in evidence in mitigation of damages that the plaintiff has already recovered (or has brought actions for) damages, or has received or agreed to receive compensation in respect of a libel or libels to the same purport or effect as the libel for which such action has been brought. (Sect. 6.)

Person proceeded against criminally a competent witness.

Every person charged with the offence of libel before any Court of criminal jurisdiction, and the husband or wife of the person so charged, shall be competent, but not compellable, witnesses on every hearing at every stage of such charge. (Sect. 9.)

Privilege to be exercised with judgment.

It may be remarked that, even when a communication is privileged, it must be made temperately and judiciously. It is one thing, for instance, to make your communication in a sealed envelope, and another to make it unnecessarily by a telegram, which in the course of its transmission must of course be read and giggled over by a number of clerks (*i*). In a case (*k*) in Ireland it appeared that the defendants, some seed merchants, had applied to a customer for payment with a *post-card*, on which was written—

"*Sir,—Your plea of illness for not paying this trifle is mere moonshine. We will place the matter in our solicitor's hands if we have not stamps by return, if it costs us ten times the amount.*"

The customer brought an action for libel, and the seed merchants set up the defence of privileged communication; but the Court, following Williamson *v.* Freer, held that the defendants, though the communication might be *primâ facie* privileged, had gone beyond their rights in making it by post-card. "*It is difficult,*" said Palles, C. B., "*to conceive any case in which there can be a necessity to substitute a post-card for a closed letter.*"

(*i*) Williamson *v.* Freer (1874), L. R. 9 C. P. 393; 43 L. J. C. P. 161; and see Pittard *v.* Oliver, [1891] 1 Q. B. 474; 60 L. J. Q. B. 219.

(*k*) Robinson *v.* Jones (1879), L. R. Ir. 4 C. L. 391; and see Sadgrove *v.* Hole, [1901] 2 K. B. 1; 70 L. J. K. B. 455.

Where a person courts the alleged slander by a question, the occasion is privileged (Palmer *v.* Hummerston (1883), 1 C. & E. 36; and see Jones *v.* Thomas (1885), 34 W. R. 104; 53 L. T. 678; Proctor *v.* Webster (1885), 16 Q. B. D. 112; 55 L. J. Q. B. 150.) Plaintiff's own fault.

Torts which are also Crimes.

WELLS *v.* ABRAHAMS. (1872) [136]

[L. R. 7 Q. B. 554; 41 L. J. Q. B. 306.]

Mr. Wells instructed his wife to take a quantity of jewellery, including a brooch, to the shop of Mr. Abrahams, and get a substantial loan on the security. The negotiations came to nothing, and Abrahams returned a packet purporting to contain the jewellery. When the packet came to be opened, there was no brooch inside, and Mrs. Wells charged Abrahams with having stolen it. Instead, however, of a prosecution for felony, this action of trover was brought against him, and a verdict was found for the plaintiff for £150. The question now was whether the judge ought to have non-suited the plaintiff on the ground that the facts showed a felonious taking of the brooch, and Wellock *v.* Constantine (*l*) was cited. It was held, however, that the judge was quite right in not having non-suited, for he was *bound to try the issues on the record.*

"It is undoubtedly laid down in the text-books," says Lush, J., in the leading case, "that it is the duty of the person who is the victim of a felonious act on the part of another to prosecute for the felony, and he cannot obtain redress by civil action until he has satisfied that requirement; *but by what means that duty is to be enforced we are nowhere informed.*" The supposed rule and its enforcement.

(*l*) 1863), 32 L. J. Ex. 285; 2 H. & C. 145.

Rapes and assaults.

Wellock *v.* Constantine was an action by a young woman against her master for an *assault;* but when she came into the witness-box her case turned out to be *that she had been raped*, and so the judge non-suited, telling her to go and prosecute her master criminally before she asked a civil court to give her damages.

Wrong to non-suit.

Ball's case.

Wells *v.* Abrahams, however, shows that a non-suit under such circumstances is wrong: and what *is* the proper course, no one knows. A perusal of the judgments in the case of *Ex parte* Ball (*m*) will show how doubtful and unsatisfactory is the present state of the law. The following remarks of Bramwell, L. J. (in which James, L. J., said that he entirely concurred), though rather long, are quite worth transplanting from the Reports into a text-book:—

View of Bramwell, L. J.

"In this case the debt which is sought to be proved arose from the felonious act of the bankrupt in embezzling the moneys of his employers. The question is, whether, that being so, and no more having been done than has been done towards prosecuting the bankrupt, the trustee in the liquidation of Messrs. Willis & Co., the employers, can prove the debt in the bankruptcy. The law on this subject is in a remarkable state. For 300 years it has been said in various ways by judges, many of the greatest eminence, without intimating a doubt, except in one instance, that there is some impediment to the maintenance of an action for a debt arising in this way. The doubt is that which was not so much *expressed* by Mr. Justice Blackburn, in Wells *v.* Abrahams (*n*), as *to be inferred* from what he said. But though such an opinion has been entertained and expressed for all this time, there are but two cases in which it has operated to prevent the debt being enforced. These two cases are Wellock *v.* Constantine (*o*) and *Ex parte* Elliot (*p*). Wellock *v.* Constantine has been said to be no authority. If I may speak of myself, I have no doubt I concurred in the judgment, or the statement that I did so would have been set right; but I am sure I must have done so in the faintest way, not only from what I think now, but from what I am reported to have said then, and from there being no reason given for the judgment which I should have desired to give if I had thought there were any good ones to support it. But, at all events, there are the opinions of Chief Baron Pollock and Mr. Justice Willes—opinions which no one who knew those judges will undervalue. Then there is the judgment in *Ex parte* Elliot, besides the expressed opinion for centuries that

(*m*) (1879), 10 Ch. Div. 667; 48 L. J. Bk. 57.
(*n*) *Ubi sup.*
(*o*) (1863), 2 H. & C. 146; 32 L. J. Ex. 285.
(*p*) (1837), 3 Mont. & A. 110; 2 Deac. 172.

the felonious origin of a debt is in some way an impediment to its enforcement. But in what way? I can think of only four possible ways:—1. That no cause of action arises at all out of a felony; 2. That it does not arise till prosecution; 3. That it arises on the act, but is suspended till prosecution; 4. That there is neither defence to nor suspension of the claim by or at the instance of the felon debtor, but that the Court of its own motion, or on the suggestion of the Crown, should stay proceedings till public justice is satisfied. It must be admitted that there are great difficulties in the way of each of these theories. That the first is not true is shown by Marsh *v.* Keating (*q*), where it was held that prosecution being impossible, a felony gave rise to a recoverable debt. It is difficult to suppose that the second supposed solution of the problem is correct. That would be to make the cause of action the act of a felon *plus* a prosecution. The cause of action would not arise till after both. Till then the Statute of Limitations would not run. In such a case as the present, or where the felon had died, it would be impossible. And it is to be observed that it is never suggested that the cause of action is the debt and the prosecution. The suspension of a cause of action is a thing nearly unknown to the law. It exists where a negotiable instrument is given for a debt, and in cases of compositions with creditors, and these were not held till after much doubt and contest. There may be other instances. And what is to happen? Is the Statute of Limitations to run? Suppose the debtor or his representative sue the creditors, is his set-off suspended? Then how is the defence of impediment to be set up? By plea? That would be contrary to the rule *nemo allegans suam turpitudinem est audiendus*. Besides, it would be absurd to suppose that the debtor himself ever would so plead and face the consequences. Then is the fourth solution right? Nobody ever heard of such a thing; nobody in any case or book ever suggested it till Mr. Justice Blackburn did as a possibility. Is it left to the Court to find it out on the pleading? If it appears on the trial, is the judge to discharge the jury? How is the Crown to know of it? There are difficulties, then, in all the possible ways in which one can suppose this impediment to be set up to the prosecution of an action. But, again, suppose it can be, what is the result? It has been held that when the felon is executed for another felony the claim may be maintained. What is to happen when he dies a natural death, when he goes beyond the jurisdiction, when there is a prosecution and an acquittal from collusion

(*q*) (1834), 1 Bing. N. C. 198; 1 Scott, 5. See also Jacobs *v.* Morris, [1902] 1 Ch. 816; 71 L. J. Ch. 363.

or carelessness by some prosecutor other than the party injured? All these cases create great difficulties to my mind in the application of this alleged law, and go a long way to justify Mr. Justice Blackburn's doubt. Still, after the continued expression of opinion and the cases of *Ex parte* Elliott (*r*) and Wellock *v.* Constantine (*s*), I should hesitate to say that there is no practical law as alleged by the respondent."

Leslie's case.

The more recent case of *Ex parte* Leslie (*t*) in itself hardly touches the point. Some bankers allowed a customer to overdraw, on his depositing some acceptances which turned out to be forgeries, and the question was whether they could prove in his subsequent bankruptcy without having prosecuted. "We have been referred," said Jessel, M. R., with whom the rest of the Court agreed, "to a line of authorities which seem to show that when a claim arises out of a felony, you cannot sue for it until you have prosecuted the felon, or someone else has prosecuted him, or a prosecution has become impossible. *That may or may not be so; I do not wish to discuss that question on the present occasion.* But, assuming that it is so, the rule has no application to the present case, in which the claim is founded on an independent contract antecedent to the corrupt bargain."

Doubt suggested by Jessel, M. R., as to existence of rule.

Lord Halsbury, L. C.

The most recent expression of judicial opinion on this question is the *dictum* of Lord Halsbury, L. C., in the case of Vernon *v.* Watson (*u*), where he said: "The old principle of law, *founded upon public policy and expediency*—that when a claim is founded upon a matter which might be the subject of criminal proceedings, the person seeking to enforce it must prosecute for the criminal offence before he can sue in a civil action—is not in question here."

(*r*) *Ubi sup.*

(*s*) *Ubi sup.*

(*t*) (1882), 20 Ch. Div. 131; 51 L. J. Ch. 689; and see Roope *v.* D'Avigdor (1883), 10 Q. B. D. 412; 48 L. T. 761, where it was decided that a statement of claim is not demurrable on the ground that it shows the cause of action to be a felony. See also Wickham *v.* Gatrill (1854), 2 Sm. & G. 353; 23 L. J. Ch. 783; Chowne *v.* Baylis (1862), 31 Beav. 351; 31 L. J. Ch. 757; S. *v.* S. or A. *v.* B. (1889), 16 Cox, C. C. 566; 24 L. R. Ir. 235.

(*u*) [1891] 2 Q. B. 288; 60 L. J. Q. B. 472. A good criticism of the supposed rule is to be found in Pollock on Torts, pp. 197—200 (6th ed.); and see per Maule, J., in Ward *v.* Lloyd (1843), 7 Scott, N. R. 499, 507, a case of alleged compounding of felony: "It would be a strong thing to say that every man is bound to prosecute all the felonies that come to his knowledge; and I do not know why it is the duty of the party who suffers by the felony to prosecute the felon, rather than that of any other person; on the contrary, it is a Christian duty to forgive one's enemies; and I think he does a very humane and charitable and Christian-like thing in abstaining from prosecuting."

If criminal proceedings have been taken, it is immaterial at whose instance, or with what result they have been conducted (*x*).

Action against third party.

It is to be observed that the rule only applies when the action is against the person guilty of the felony. It does not prevent anyone from suing an innocent third party. If somebody has stolen my books and sold them to a bookseller, I may bring an action of trover against the bookseller, though I have not made the faintest attempt at prosecuting the thief (*y*). So a master may be held civilly responsible for a criminal tort of his servant (*z*).

Rule does not apply to misdemeanour.

It is also to be observed that the rule applies only to felonies. For a misdemeanour, such as assault or libel, the aggrieved person may bring an action, quite regardless of the fact that the defendant is really a criminal (*a*).

Campbell's Act.

Moreover, an action under Lord Campbell's Act may be brought, "although the death shall have been caused under such circumstances as amount in law to felony" (*b*).

Public policy.

There are other cases in which the right of bringing an action is restrained on grounds of public policy. No action, for instance, lies against a commanding officer for acts done in the ordinary course of military discipline (*c*). "*The salvation of this country*," said the Court in Johnstone *v.* Sutton (*d*), "*depends upon the discipline of the fleet*. . . . If this action is admitted, every acquittal before a court-martial will produce one."

In the case of Appleby *v.* Franklin (*e*), a paragraph in a statement of claim, which alleged that the defendant after seducing the plaintiff administered to her certain noxious drugs for the purpose of procuring abortion, was reinstated, when a Master had struck it out on the ground that it disclosed a felony for which the defendant should have been criminally prosecuted.

(*x*) Dudley *v.* West Bromwich Banking Co. (1860), 1 J. & H. 14; 2 L. T. 47.

(*y*) White *v.* Spettigue (1845), 13 M. & W. 603; 14 L. J. Ex. 99; and see Osborn *v.* Gillett (1873), L. R. 8 Ex. 88; 42 L. J. Ex. 53; Lee *v.* Bayes (1856), 18 C. B. 599; 25 L. J. C. P. 249; Stone *v.* Marsh (1827), 6 B. & C. 551; R. & M. 364; Gimson *v.* Woodfall (1825), 2 C. & P. 41; Quinlan *v.* Barber (1825), Batty's Irish Rep. 47; Crosby *v.* Leng (1810), 12 East, 409; 1 Hale, P. C. 546; Hayes *v.* Smith (1825), Smith & Batty's Irish Rep. 378.

(*z*) See Dyer *v.* Munday, [1895] 1 Q. B. 742; 64 L. J. Q. B. 448.

(*a*) Reg. *v.* Hardey (1850), 14 Q. B. 529; 19 L. J. Q. B. 196.

(*b*) 9 & 10 Vict. c. 93, s. 1.

(*c*) Johnstone *v.* Sutton (1787), 1 T. R. 493, 784; 1 Bro. P. C. 76; and see Dawkins *v.* Rokeby (1866), 4 F. & F. 806; Dawkins *v.* Paulet (1869), L. R. 5 Q. B. 94; 39 L. J. Q. B. 53; Freer *v.* Marshall (1865), 4 F. & F. 485; and see The Midland Insurance Co. *v.* Smith (1881), 6 Q. B. D. 561; 50 L. J. Q. B. 329, a fire insurance case, where it was decided that the action was maintainable in spite of a felony having been the cause of action and the felon had not been prosecuted.

(*d*) *Supra*.

(*e*) (1887), 17 Q. B. D. 93; 55 L. J. Q. B. 129.

Privity.

[137] LANGRIDGE *v.* LEVY. (1838)

[4 M. & W. 337; 46 R. R. 689.]

Mr. Langridge, senior, walking one day down the streets of Bristol, noticed a gun in a shop window with the following seductive advertisement tied round its muzzle :—

"*Warranted, this elegant twist gun by Nock, with case complete, made for his late Majesty George IV.; cost* 60 *guineas; can be had for* 25."

He entered the shop, which was the defendant's, and told him he wanted a nice, quiet, steady-going gun for the use of himself and his sons. Finally, he bought the elegant twist gun as warranted.

This warranty was false and fraudulent to the defendant's knowledge, and, shortly after the purchase, one of the young Langridges was using the gun in a perfectly fair and sportsmanlike manner, when it burst and blew off his left hand.

It was this victim of Levy's dishonesty who now brought an action against him, and the chief point relied on by the defendant's counsel was that, if anyone had a right to bring an action, it was the father, to whom the gun had been sold; as for the son, they said, there was no privity of contract between him and the gunsmith. This defence, however, did not succeed, and the youthful Langridge got as much consolation as money could give him for the loss of his hand.

False representation, when actionable.

The decision in this case depended so much upon the special circumstances that there can be deduced from it no wider principle than this, that he who knowingly makes a false statement, intending others to act upon it, is liable for any damage resulting to any-

one to whom it may have been intended to be communicated, and who has in fact acted upon it (*f*). The decision proceeded upon the ground of the *knowledge and fraud* of defendant (*g*).

Privity not always necessary to support an action in tort.

A particular transaction may sometimes be looked at as affording the right to bring an action either for the breach of contract or in tort. Take, for instance, the case of a railway disaster caused by the company's negligence; the company are liable to the passenger, in contract, because they gave him a ticket, and in tort, because they were not sufficiently careful in carrying him. In such a case as this there is clearly direct privity between the plaintiff and the defendants.

But, generally speaking, privity is not necessary to support an action in tort. In Langridge *v.* Levy, the person with whom the contract was made, and with whom alone there was privity, was the father, and yet the son was allowed to bring an action and recover damages. The reason of this is that Levy had been guilty of a tort in making a false representation. If he had made no false representation, he would have only been liable to the father for breach of contract. As it was, he was held liable to the son, who confided in the representation, and who, he knew, was going to use the gun. It is to be observed, however, that if the plaintiff had been a friend of the family, whose use of the gun was not contemplated by Levy at the time of the sale, no action could have been successfully maintained (*h*). George *v.* Skivington (*i*), where a chemist sold some poisonous hair-wash for the use of a customer's wife, is a subsequent case analogous to Langridge *v.* Levy, with the substitution of negligence for fraud.

Poisonous hair-wash

In Blakemore *v.* Bristol and Exeter Railway Co. (*k*), the Court declared that it had always been considered that Langridge *v.* Levy was not to be extended in its application.

A dangerous lamp.

The cases of Langridge *v.* Levy and George *v.* Skivington must be distinguished from Longmeid *v.* Holliday (*l*), where a tradesman,

(*f*) See Pasley *v.* Freeman, *ante*, p. 535.

(*g*) Winterbottom *v.* Wright (1842), 10 M. & W. 109; and see Haigh *v.* Royal Mail Steam Packet Co. (1883), 52 L. J. Q. B. 395, 640; 5 Asp. M. C. 47.

(*h*) Parry *v.* Smith (1879), 4 C. P. D. 325; 48 L. J. C. P. 731; but see Collis *v.* Selden (1868), L. R. 3 C. P. 495; 37 L. J. C. P. 233.

(*i*) (1869), L. R. 5 Ex. 1; 39 L. J. Ex. 8.

(*k*) (1858), 8 E. & B. 1035; 27 L. J. Q. B. 167.

(*l*) (1851), 6 Exch. 761; 20 L. J. Ex. 430; and see also the important case of Heaven *v.* Pender (1883), 11 Q. B. D. 503; 52 L. J. Q. B. 702; reversing 9 Q. B. D. 302; 51 L. J. Q. B. 465; distinguished in Caledonian Ry. *v.* Mulholland, [1898] A. C. 216; 67 L. J. P. C. 1; where it was held that if A., a servant of B., is injured in consequence of the defective condition of a truck belonging to C., which had been lent, in the ordinary

in all honesty, warranted a defective lamp to be sound. The lamp exploded and injured a person who was not a party to the contract, but whose use of the lamp had been contemplated by the seller. This person, it was held, could not maintain an action against him; not in contract, because the plaintiff was not privy to the warranty; not in tort, because the defendant, saying only what he believed to be true, was not guilty of any tort.

Contract or tort?

The breach of a duty to use reasonable care may always be treated as a tort, whether or not it is also a breach of contract, and whether the negligence complained of consisted in a positive misfeasance or in an omission (*m*). If a railway company contract with a master to carry his servant, and in doing so are guilty of negligence, which causes bodily hurt to the servant, and consequent damage by loss of service to the master, the company may be sued in contract by the master, and in tort by the servant (*n*). So, too, it has been held (*o*) that, where part of the ordinary luggage of a servant (*e.g.*, his livery), which he is taking with him as a passenger by a railway, is the property of his master, and it is damaged whilst in the custody of the railway company (*e.g.*, by being negligently overturned in front of a train), the master can maintain an action of tort against the company for the amount of the damage notwithstanding that the contract of carriage is with the servant alone. The case of Berringer *v.* Great Eastern Railway Co. (*p*) deserves attention. It was an action by a father, a butcher, for loss of the services of his son, who had helped him in the shop. The boy had taken a ticket from the London, Tilbury and Southend Railway Co., and was injured at Stepney by the negligence of the defendant company. The point was raised for the defence that there was no privity of contract between the plaintiff and the defendants. But the Court held that the claim was valid, saying, "The claim is against the company, not parties to the contract of carriage, for a pure tort,

Pure tort.

course of railway exchange, to B. for the conveyance of goods to one of B.'s customers, C. is under no liability to A. As to liability for representations, see Barry *v.* Crosskey (1861), 2 J. & H. 1; Peek *v.* Gurney (1873), L. R. 6 H. L. 377; 43 L. J. Ch. 19.

(*m*) See the recent cases of Taylor *v.* M. S. & L. Ry. Co., [1895] 1 Q. B. 134; 64 L. J. Q. B. 6; Kelly *v.* Metropolitan Ry. Co., [1895] 1 Q. B. 944; 64 L. J. Q. B. 568; and Meux *v.* G. E. Ry. Co., [1895] 2 Q. B. 387; 64 L. J. Q. B. 657; which, it is submitted, overrule Alton *v.* M. Ry. Co. (1865), 34 L. J. C. P. 292; 19 C. B. N. S. 213.

(*n*) Marshall *v.* York, &c. Ry. Co. (1851), 11 C. B. 655; 21 L. J. C. P. 34; and see also the case of Becher *v.* Great Eastern Ry. Co. (1870), L. R. 5 Q. B. 241; 39 L. J. Q. B. 122.

(*o*) Meux *v.* G. E. Ry. Co., *supra*.

(*p*) (1879), 4 C. P. D. 163; 48 L. J. C. P. 400.

such as would be committed if a vehicle in the highway were wrongfully driven against, or across the path of, another vehicle, whereby a servant therein was hurt and his master lost his services." See also the note to Thomas *v.* Rhymney Railway Co., *ante*, p. 499; and see Elliott *v.* Hall (1885), 15 Q. B. D. 315; 54 L. J. Q. B. 518: injury to servant of vendee; Jewson *v.* Gatti (1885), 1 C. & E. 564, occupier of premises and strangers; and Norris *v.* Catmur (1885), 1 C. & E. 576, landlord and sub-tenant.

Penalties, &c.

CREPPS *v.* DURDEN. (1777) [138]

[COWP. 640.]

It was very wrong, of course, of Peter Crepps to be selling hot rolls on a Sunday morning instead of being at church, and as it could not well be called a "work of necessity and charity," it was no doubt a violation of the Act of Charles II., of pious memory. But the Act provides for a fine of 5*s.* only to be inflicted on the offender, and, therefore, that worthy magistrate of Westminster, Mr. Durden, had no business whatever to say that because Crepps had sold four hot rolls he should be fined £1—that is to say, 5*s.* a roll. This was distinctly laid down by Lord Mansfield: "The penalty incurred by this offence is 5*s.* There is no idea conveyed by the Act that if a tailor sews on the Lord's Day every stitch he takes is a separate offence. . . . *There can be but one entire offence on one and the same day.*"

The principle of Crepps *v.* Durden was approved and applied in the case of The Apothecaries' Co. *v.* Jones (*q*), which arose

(*q*) [1893] 1 Q. B. 89; 67 L. T. 677; and see Reg. *v.* Brown, [1895] 1 Q. B. 119; 64 L. J. M. C. 1; where an unsuccessful attempt was

under sect. 20 of the Apothecaries Act, 1815 (55 Geo. III. c. 194), which provides that, if any person "shall act or practise as an apothecary" without having obtained the requisite certificate, "every person so offending shall for every such offence forfeit £20." The defendant had given advice and had prescribed and supplied medicine to three separate persons on different occasions on the same day, without a certificate, and was sued for three separate penalties. It was, however, held that only one offence had been committed, and that only one penalty was therefore recoverable, for the statute contemplated an habitual course of conduct, and not an isolated act.

Milnes *v.* Bale.

But in Milnes *v.* Bale (*r*) it was held that, where a person has been guilty of several acts of bribery at a municipal election, he is liable to a penalty in respect of each such act of bribery. "Various decisions," said Brett, J., "were cited as authorities in favour of the contention that there can be only one penalty. If I understand the effect of these cases rightly, in every case where it was held that there could only be one penalty in respect of several acts, it was because all the acts only constituted one offence against which the penalty was enacted. The test, as it appears to me, is whether, having charged the offence against which the penalty is enacted, you can prove it by giving in evidence several distinct acts committed by the person charged. It is not strictly accurate to speak of the penalties as cumulative in such a case as the present. The question is, whether there is one or more offences, and if the offences are distinct, there is only one penalty for each offence. I cannot find that in any case in which each act done was a complete offence in itself, and in which it would have been inadmissible to give other acts in proof of the committal of the same offence, it was held that several penalties could not be inflicted. In the case of Reg. *v.* Scott (*s*), the effect of the decision seems to me to be this: where several oaths are made use of on one occasion it is but one swearing, and consequently there is only one offence, and only one penalty is incurred, though such penalty is cumulative, being at the rate of two shillings for each oath; but if the same set of oaths were used on distinct occasions, though they all occurred on the same day, there would be several offences, and a penalty would be incurred for each distinct swearing. There is no decision that if a man swore at one person at one time of the day, and at another

Reg. *v.* Scott.

made to inflict two fines upon a person for two betting offences committed on the same day.

(*r*) (1875), L. R. 10 C. P. 591; 44 L. J. C. P. 336.

(*s*) (1863), 4 B. & S. 368; 33 L. J. M. C. 15.

person another time, he would not be liable to two penalties. It seems to me that in such a case he would be liable to two penalties, because there would be two offences. In Garrett *v.* Messenger (*t*) the offence charged was keeping open an unlicensed house. It is not keeping it open for an hour that is the offence; the offence is the keeping a house to be used as a house of entertainment without a licence, which is a comprehensive offence, to be proved by many acts. According to the case of Marks *v.* Benjamin (*u*), it is necessary in the case of a charge of this sort to give evidence of more than having the house open for a short period, or in a particular instance. In such a case a penalty cannot be imposed for each act, because each act is not a separate offence. So in Pilcher *v.* Stafford (*x*) the ground of the decision was that there was only one offence, viz., leaving a child unvaccinated for a certain period, and consequently there could only be one penalty. Again, in Crepps *v.* Durden, the offence contemplated was exercising the party's ordinary calling on Sunday. It was not the doing of one isolated act that would be evidence of the committal of the offence, but several acts might be given in evidence to prove one offence. All these decisions are inapplicable to the present case because each act of bribery is a complete offence in itself."

Garrett *v.* Messenger.

Marks *v.* Benjamin.

Pilcher *v.* Stafford.

As to actions against magistrates, the reader is referred to 11 & 12 Vict. c. 44, "An Act to protect justices of the peace from vexatious actions for acts done by them in the execution of their office." It is sufficient here to point attention to the first two sections of this Act, which provide that if the act complained of was done by the magistrate as to any matter *within his jurisdiction*, the plaintiff must show that he acted *maliciously and without reasonable and probable cause*, and that if it was done in a matter in which the magistrate had *no jurisdiction*, or if he *exceeded his jurisdiction*, the plaintiff must show that the conviction or order has been quashed.

Actions against justices.

Other sections of this Act specify the time within which the action is to be brought, the notice of action required, the way and effect of tendering amends, &c., and in various other ways the justice of the peace is hedged about and protected against litigious evil-doers.

It may be mentioned that the jurisdiction of justices at petty sessions is generally ousted if a *bonâ fide* claim of right is put for-

Claim of right.

(*t*) (1867), L. R. 2 C. P. 583; 36 L. J. C. P. 337; and see Llewellyn *v.* Glamorgan Vale Ry., [1898] 1 Q. B. 473; 67 L. J. Q. B. 305; a case under sects. 53 and 54 of the Railway Clauses Act, 1845 (8 & 9 Vict. c. 20).

(*u*) (1839), 5 M. & W. 565; 3 Jur. 1194.

(*x*) (1864), 4 B. & S. 775; 33 L. J. M. C. 113.

ward by the defendant. This subject, however, is not sufficiently connected with *nisi prius* to merit discussion at any length here; and the reader is referred to the following cases:—Hargreaves *v.* Diddams (1875), L. R. 10 Q. B. 582; 44 L. J. M. C. 178; Reg. *v.* Pearson (1870), L. R. 5 Q. B. 237; 39 L. J. M. C. 76; White *v.* Fox (1880), 49 L. J. M. C. 60; 44 J. P. 618; White *v.* Feast (1872), L. R. 7 Q. B. 353; 41 L. J. M. C. 81; Denny *v.* Thwaites (1876), 2 Ex. D. 21; 46 L. J. M. C. 141; Reece *v.* Miller (1882), 8 Q. B. D. 626; 51 L. J. M. C. 64; and Pearce *v.* Scotcher (1882), 9 Q. B. D. 162; 46 L. T. 342; R. *v.* Young, *Ex parte* White (1883), 52 L. J. M. C. 55; 47 J. P. 519; Rex *v.* French, *Ex parte* Roberts, [1902] 1 K. B. 637; 71 L. J. K. B. 382.

Malicious Prosecution and False Imprisonment.

[139] LISTER *v.* PERRYMAN. (1870)

[L. R. 4 H. L. 521; 39 L. J. Ex. 177.]

Mr. Lister was the owner of a rifle, which was left under the charge of his coachman, Hinton. One day a man named Perryman happened to call on Hinton, and, seeing the rifle, exclaimed what a capital one it was, and how much he would like to have just such another. Not long afterwards the rifle was missed. Hinton reported the loss to his master, and at the same time informed him that one Robinson, the coachman of a gentleman living in the neighbourhood, had seen it in a barn where Perryman lived, and had asked him what he was doing with Lister's gun, to which Perryman had replied, "It is not Lister's gun; it is my gun;" but that Robinson said he was sure the gun he saw was the one Lister had missed. Hinton added that he had since gone with Robinson to Perryman's and had been shown a gun which was not Lister's, and

which Perryman said was the only gun he had. Perryman, having been tried and acquitted on the charge of stealing the rifle, now brought an action for false imprisonment. The judge at the trial directed the jury that, as Lister had not seen Robinson before causing Perryman to be arrested, he had acted on hearsay evidence alone, and without "reasonable and probable cause." This, however, was held to be a misdirection, on the ground that Lister had "reasonable and probable cause" for instituting a prosecution; and the principle was distinctly affirmed that *it is for the jury to find the facts on which the question of reasonable and probable cause depends, but for the judge to determine whether the facts found do constitute reasonable and probable cause.*

Although somewhat analogous, and sometimes confounded, actions for malicious prosecution and for false imprisonment are perfectly distinct, and a person is frequently liable to the one and not to the other. "The distinction between false imprisonment and malicious prosecution," said Willes, J., in Austin *v.* Dowling (*y*), "is well illustrated by the case where, parties being before a magistrate, one makes a charge against another, whereupon the magistrate orders the person charged to be taken into custody and detained until the matter can be investigated. The party making the charge is not liable to an action for false imprisonment, because he does not set a ministerial officer in motion, but a judicial officer. The opinion and judgment of a judicial officer are interposed between the charge and the imprisonment."

In an action for malicious prosecution the plaintiff must prove four things:— Four points.

(1.) *That the defendant preferred a criminal charge against him before a judicial officer.* 1. The prosecution.

But if a person, acting conscientiously and like an honest man, comes before a magistrate and makes his complaint, and the magistrate foolishly treats as a felony what is really only a civil matter, and issues his warrant accordingly, the person making the complaint is not answerable for the magistrate's mistake (*z*). So where

(*y*) (1870), L. R. 5 C. P. 534; 39 L. J. C. P. 260; and see also Cahill *v.* Fitzgibbon (1885), 16 L. R. Ir. 371.

(*z*) Leigh *v.* Webb (1800), 3 Esp. 165; Wyatt *v.* White (1860), 5 H.

Danby *v.* Beardsley.

a doctor in Lancashire, having missed two pairs of horse clippers from his stables, sent for a policeman, and said, "*I have had two pairs of clippers stolen from me, and they were last seen in the possession of Danby*," whereupon the policeman, having made inquiry, and without communicating with the doctor, arrested Danby, who had to appear before the magistrates and was committed for trial, it was held that there was no evidence that the doctor was the prosecutor, and therefore he was not liable in an action for malicious prosecution (*a*).

2. Malice.

(2.) *That the defendant acted maliciously.*

"In an action of this description the question of malice is an independent one—of fact purely—and altogether for the consideration of the jury" (*b*). But if the defendant acted without reasonable and probable cause, the jury will not *generally* have much difficulty in arriving at the conclusion of malice (*c*). But, on the other hand, it would not do the plaintiff any good to prove *malice alone*, for a person may be actuated by the bitterest malice and yet have plenty of ground for prosecuting. Malice is proved, for example, by showing that the defendant *did not really himself believe in the plaintiff's guilt*, or by it appearing that what he really wanted was not to punish crime (as the theory of our law is that all prosecutors wish primarily to do), but *to enforce payment of a debt* (*d*).

Subsequent malice.

A prosecution which is not malicious when begun, may become so by the prosecutor *discovering that the defendant is really innocent and yet going on* with the criminal proceedings (*e*).

Action against company.

It may now be taken as settled that an action for malicious prosecution will lie against a company where the wrongful act was done by one of their servants in the course of his employment, and in the supposed interest of his employers (*f*).

& N. 371; 29 L. J. Ex. 193; and see Clarke *v.* Postman (1834), 6 C. & P. 423; 40 R. R. 811.

(*a*) Danby *v.* Beardsley (1881), 43 L. T. 603.

(*b*) Per Hawkins, J., in Hicks *v.* Faulkner (1878), 8 Q. B. D. 167; affirmed, 46 L. T. 127; and see also Harrison *v.* National Provincial Bank (1885), 49 J. P. 390.

(*c*) But see Brown *v.* Hawkes, [1891] 2 Q. B. 718; 61 L. J. Q. B. 151; where it was held, that although the absence of reasonable and probable cause is sometimes evidence of malice, yet it is not evidence of malice when the prosecutor honestly believes in the charge.

(*d*) See Hinton *v.* Heather (1845), 14 M. & W. 131; 15 L. J. Ex. 39; Broad *v.* Ham (1839), 5 Bing. N. C. 722; 8 Scott, 40; Brooks *v.* Warwick (1818), 2 Stark, 389; 20 R. R. 697; Haddrick *v.* Heslop (1848), 12 Q. B. 267; 17 L. J. Q. B. 313; and Heslop *v.* Chapman (1853), 23 L. J. Q. B. 49; 18 Jur. 348.

(*e*) Fitzjohn *v.* Mackinder (1861), 9 C. B. N. S. 505; 30 L. J. C. P. 257.

(*f*) Cornford *v.* Carlton Bank, Limited, [1900] 1 Q. B. 22; affirming, [1899] 1 Q. B. 392; and Edwards *v.* Midland Ry. Co.

(3.) That the defendant acted *without reasonable and probable cause.* 3. Reasonable and probable cause.

Whether there was reasonable and probable cause is, when the facts are found, a *question of law* for the judge. Hawkins, J., has very lucidly summarised the principles on which a judge ought to act in deciding this question in the case of Hicks *v.* Faulkner (*g*), where it was held that, even though a man might through a defective memory have forgotten a particular occurrence, the recollection of which would have restrained him from instituting criminal proceedings, still, if it was reasonable under the circumstances that he should trust to his memory, he ought to be excused. But the learned judge expressly points out that "it would be unreasonable to rely either on an informant known to be untrustworthy, or a memory known to be unreliable, *without express confirmation.*" Hicks *v.* Faulkner.

In Hope *v.* Evered (*h*), a case under sect. 10 of the Criminal Law Amendment Act, 1885 (48 & 49 Vict. c. 69), it was held that the justice has a judicial duty to perform, and that his decision that there is reasonable cause for suspicion is a protection to a person who *bonâ fide* applies for a search warrant, and is an answer to an action for maliciously causing the warrant to issue. Hope *v.* Evered.

Counsel's opinion is no protection to the defendant who has instituted an unfounded and malicious prosecution (*i*). Counsel's opinion no good.

(4.) That the proceedings *terminated in the plaintiff's favour.* 4. Termination in plaintiff's favour.

It may happen, however, that the proceedings were in their nature incapable of terminating in the plaintiff's favour (*e.g.*, in the case of a malicious exhibition of articles of the peace), and in such a case the plaintiff is excused from the proof (*k*). But he will not be excused merely because there is no appeal from a particular summary conviction of justices (*l*). To hold otherwise would be, as Byles, J., said in the case referred to, "disturbing foundations." Articles of peace. No appeal.

If a person is convicted of an offence less serious than that with which he is charged, he may bring an action for malicious prose-

(1880), 6 Q. B. D. 287; 50 L. J. Q. B. 281. Lord Bramwell, however, expressed a strong opinion to the contrary in Abrath *v.* N. E. Ry. Co. (1886), 11 App. Cas. 247; 55 L. J. Q. B. 457; but, as pointed out by Lords Selborne and Fitzgerald, this is only a dictum; and see Kent *v.* Courage (1891), 55 J. P. 264; and Rayson *v.* South London Tramways Co., [1893] 2 Q. B. 304; 62 L. J. Q. B. 593.

(*g*) *Ubi supra.* See Brown *v.* Hawkes, *supra.*

(*h*) (1886), 17 Q. B. D. 338; 55 L. J. M. C. 146. See also Lea *v.* Charrington (1889), 2 Q. B. D. 45, 272; 58 L. J. Q. B. 460; 61 L. T. 450.

(*i*) Hewlett *v.* Cruchley (1813), 5 Taunt. 277.

(*k*) Steward *v.* Gromett (1859), 7 C. B. N. S. 191.

(*l*) Basébé *v.* Matthews (1867), L. R. 2 C. P. 684; 36 L. J. M. C. 93; followed in Bynoe *v.* Bank of England, [1902] 1 K. B. 467; 71 L. J. K. B. 208.

cution. In the case of Boaler *v.* Holder (*m*), the plaintiff was indicted under sect. 4 of the Newspaper Libel Act, though only committed for trial under sect. 5, and having brought an action for malicious prosecution, it was held that the conviction was no bar to the action. "To put a man on his trial," said Wills, J., "for a much graver offence than you have any chance of convicting him of, is a legal wrong."

Damages.

Further, in order to recover damages in an action for malicious prosecution, the plaintiff must show that he has suffered either in *person, reputation, or pocket* (*n*). Every expense properly incurred in defending himself from the false accusation may be recovered (*o*). General evidence of the plaintiff's bad character in mitigation of damages can only be given when he is trying to palm himself off on the jury as a highly respectable individual who ought to have extra compensation in consequence of the injury to his formerly untarnished reputation (*p*).

Maliciously causing bankruptcy.

An action may be maintained for maliciously causing a man to be made bankrupt (*q*).

Bankruptcy.

In the Metropolitan Bank *v.* Pooley (*r*), it was held that a bankrupt whose adjudication in bankruptcy has not been set aside cannot maintain an action for maliciously procuring the bankruptcy, and such an action may be summarily dismissed upon summons as frivolous and vexatious.

Maliciously presenting a petition.

An action will lie for falsely and maliciously and without reasonable and probable cause presenting a petition under the Companies Acts, 1862—1867, to wind up a trading company, even although no pecuniary loss or special damage to the company can be proved, for the presentation of the petition is from its very nature calculated to injure the credit of the company.

Malicious prosecution reasonable and probable cause.

At the hearing of a plaint in a County Court to recover rent (*s*), the tenant's son was called as a witness, and swore that he had given up the key of the premises to the landlord before the rent accrued due. The landlord denied this and subsequently prosecuted the witness for perjury. He was acquitted and brought an action

(*m*) (1887), 51 J. P. 277.

(*n*) Freeman *v.* Arkell (1824), 2 B. & C. 494; 1 C. & P. 137; Leith *v.* Pope (1780), 2 W. Bl. 1327.

(*o*) Foxall *v.* Barnett (1853), 2 E. & B. 928; Rowlands *v.* Samuel (1847), 11 Q. B. 39.

(*p*) Rodriquez *v.* Tadmire (1799), 2 Esp. 721; Downing *v.* Butcher (1841), 2 M. & Rob. 374; Cornwall *v.* Richardson (1825), Ry. & M. 305; 27 R. R. 753.

(*q*) See Johnson *v.* Emerson (1871), L. R. 6 Ex. 329; 40 L. J. Ex. 201; Farley *v.* Danks (1855), 4 E. & B. 493; 24 L. J. Q. B. 244.

(*r*) (1885), 10 App. Cas. 210; 54 L. J. Q. B. 449.

(*s*) Quartz Hill Gold Mining Co. *v.* Eyre (1883), 11 Q. B. D. 674; 52 L. J. Q. B. 488.

against the landlord for malicious prosecution. At the trial the plaintiff and defendant repeated their evidence as to the key, and the judge directed the jury alternatively that if they could not arrive at a conclusion as to which of the parties was speaking the truth, the plaintiff had not made out his case, and the defendant was entitled to a verdict; and that if they thought the plaintiff did give up the key, but the defendant owing to a defective memory had forgotten the occurrence and went on with the prosecution honestly believing that the plaintiff had sworn falsely and corruptly, then the jury would not be justified in saying that the defendant maliciously, and without reasonable and probable cause, prosecuted the plaintiff, and the defendant would be entitled to their verdict. It was decided that the direction of the judge was right (*t*).

Onus of proof.

The law with reference to cases of malicious prosecution was discussed in the important case of Abrath *v.* North Eastern Railway Company, and the following principle was laid down as governing actions for malicious prosecution. The burden of proof as to all the issues arising therein lies upon the plaintiff; and, although the plaintiff proves that he was innocent of the charge laid against him, and although the judge, in order to enable himself to determine the issue of reasonable and probable cause, leaves subsidiary questions of fact to the jury, nevertheless the onus of proving the existence of such facts as tend to establish the want of reasonable and probable cause on the part of the defendant, rests upon the plaintiff. The plaintiff, a surgeon, had attended one M. for bodily injuries alleged to have been sustained in a collision upon the defendants' railway. M. brought an action against the defendants, which was compromised by the defendants paying a large sum for damages and costs. Subsequently, the directors of the defendants' company, having received certain information, caused the statements of certain persons to be taken by a solicitor; these statements tended to show that the injuries of which M. complained were not caused at the collision, but were produced wilfully by the plaintiff, with the consent of M., for the purpose of defrauding the defendants. These statements were laid before counsel, who advised that there was good ground for prosecuting the plaintiff and M. for conspiracy. The defendants accordingly prosecuted the plaintiff, but he was acquitted. In an action for malicious prosecution, the judge directed the jury to find whether the defendants had taken reasonable care to inform themselves of the true state of the case, and whether they honestly believed the case which they laid before the

(*t*) Hicks *v.* Faulkner, *ubi sup.*

magistrates; the jury having answered these questions in the affirmative, the judge entered the judgment for the defendants, and it was held by the House of Lords and the Court of Appeal, reversing the decision of the Divisional Court, that the judge had rightly entered the judgment for the defendants (*u*).

False imprisonment.

False imprisonment has been defined as "a trespass committed by one man against the person of another by unlawfully arresting him, and detaining him without any legal authority (*x*). The imprisonment need not be by actual touch; any show of authority or force submitted to is sufficient, provided there is no reasonable means of escape open to him (*y*). But the restraint must be *total;* it is not imprisoning a man to prevent his going in a particular direction (*z*). If a prisoner is unlawfully detained after he has gained a right to be discharged, it becomes a fresh imprisonment, and entitles him to bring an action for false imprisonment (*a*). All persons aiding or furthering the unlawful confinement of another are responsible for the wrong, although they may have had nothing to do with the original arrest, and had no knowledge that the arrest and imprisonment were unlawful (*b*).

Lock *v.* Ashton.

It was decided in Lock *v.* Ashton (*c*), that where a man is given into custody on a mistaken charge, and then brought before a magistrate, who remands him, damages can be given against the prosecutor only for the trespass in arresting, not for the remand, which is the judicial act of the magistrate.

Reasonable cause of suspicion.

"What is reasonable cause of suspicion," says Sir F. Pollock (*d*), "to justify arrest may be said, paradoxical as the statement looks, to be neither a question of law nor of fact, at any rate in the common sense of the terms. Not of fact, because it is for the judge and not for the jury (*e*); not of law, because 'no definite rule can be laid down for the exercise of the judge's discretion' (*f*). The anomalous character of the rule has been more than once pointed

(*u*) (1883), 11 Q. B. D. 440; 52 L. J. Q. B. 620; reversing 11 Q. B. D. 79; 52 L. J. Q. B. 352. See also (1886), 11 App. Cas. 247; 55 L. J. Q. B. 457.

(*x*) Addison on Torts, 7th ed., p. 146. See also Henderson *v.* Preston (1888), 21 Q. B. D. 362; 57 L. J. Q. B. 607.

(*y*) Grainger *v.* Hill (1838), 4 Bing. N. C. 212; Warner *v.* Riddiford (1858), 4 C. B. N. S. 180.

(*z*) Bird *v.* Jones (1845), 7 Q. B. 742; 15 L. J. Q. B. 82.

(*a*) Withers *v.* Henley (1615), Cro. Jac. 379; Mee *v.* Cruickshank, [1902] 86 L. T. 708; 66 J. P. 89.

(*b*) Griffin *v.* Coleman (1859), 4 H. & N. 265; 28 L. J. Ex. 137.

(*c*) (1848), 12 Q. B. 871; 18 L. J. Q. B. 76.

(*d*) Law of Torts, p. 220 (6th ed.); and see Howard *v.* Clarke (1888), 20 Q. B. D. 558; 58 L. T. 401.

(*e*) Hailes *v.* Marks (1861), 7 H. & N. 56; 30 L. J. Ex. 389.

(*f*) Lister *v.* Perryman, *ubi sup.*, per Lords Chelmsford and Colonsay.

out and regretted by the highest judicial authority (*g*). The truth seems to be that the question was formerly held to be one of law, and has for some time been tending to become one of fact, but the change has never been formally recognized. The only thing which can be certainly affirmed in general terms about the meaning of 'reasonable cause' in this connection is that, on the one hand, a belief honestly entertained is not of itself enough (*h*); on the other hand, a man is not bound to wait until he is in possession of such evidence as would be admissible and sufficient for prosecuting the offence to conviction, or even of the best evidence which he might obtain by further inquiry. 'It does not follow that, because it would be very reasonable to make further inquiry, it is not reasonable to act without doing so' (*i*). It is obvious, also, that the existence or non-existence of reasonable cause must be judged, not by the event, but by the party's means of knowledge at the time."

As to the liability of a company for false imprisonment committed by their servant, the two cases of Furlong *v.* South London Tramways Co. (1884), 48 J. P. 329; 1 C. & E. 316; and Charleston *v.* London Tramways Co. (1888), 36 W. R. 367; 32 S. J. 557, should be compared. Company.

No Contribution between Defendants in Tort.

MERRYWEATHER *v.* NIXAN. (1799) [140]

[8 T. R. 186; 16 R. R. 810.]

Merryweather and Nixan destroyed the machinery and injured the mill of a man named Starkey. The mill-owner brought an action against the pair of them. The jury gave him £840 as damages, and, instead of getting

(*g*) Lord Campbell in Broughton *v.* Jackson (1852), 18 Q. B. 378, 383; 21 L. J. Q. B. 266; Lords Hatherley, Westbury, and Colonsay in Lister *v.* Perryman, *ubi sup.*

(*h*) Broughton *v.* Jackson, *ubi sup.*; the defendant must show "facts which would create a reasonable suspicion in the mind of a reasonable man"; per Lord Campbell, C. J.

(*i*) Bramwell, B., Perryman *v.* Lister (1868), L. R. 3 Ex. at p. 202; approved by Lord Hatherley, S. C. nom. Lister *v.* Perryman, L. R. 4 H. L. at p. 533.

£420 from each, he made Merryweather pay the whole £840. Merryweather did not see why he should pay for Nixan's whistle as well as his own, and sued him for contribution, that is to say, for £420. In fairness, of course, Nixan ought to have made no difficulty about paying it; but he steadfastly declined to do anything of the sort. The law upheld him in this refusal, for *ex turpi causâ non oritur actio.*

No contribution.

There is no contribution between defendants in *tort*. In *contract* there is. If there are two sureties, and one of them is made to pay the whole debt, he can sue his brother surety for half of what he has paid (*k*). In such a case there is no *turpis causa*.

Exception where plaintiff quite innocent.

But the rule that one tortfeasor cannot sue another for contribution does not extend to the case where the former has acted quite innocently, and was simply obeying what he believed to be the lawful instructions of his employer. Such a person may claim not merely contribution, but an absolute indemnification. If A. orders B. to drive cattle out of a field, and in obeying the order B. unwittingly commits a trespass, A. must indemnify him; but it would be different if the order given and obeyed were to assault C. without rhyme or reason, because B. must have known that A. had no business to tell him to do that (*l*).

Defaulting trustees.

Another exception is to be found in the case of defaulting trustees. Though, as respects the remedy of the *cestui que trust*, each trustee is individually responsible for the whole amount of the loss occasioned by a breach of trust, as between the trustees themselves, the loss may be thrown upon the party on whom, as recipient of the money or otherwise, the responsibility ought in equity to fall, or, if he be dead, upon his estate. If all the trustees be equally guilty, then (unless the transaction was vitiated by not only constructive, but such actual fraud, that the Court will hold itself entirely aloof) an apportionment or contribution amongst the trustees may be compelled (*m*).

When a trustee commits a breach of trust at the instigation or request or with the consent in writing of a beneficiary, the Court

(*k*) See Whitcher *v.* Hall, *ante*, p. 390.

(*l*) Pearson *v.* Skelton (1836), 1 M. & W. 504; Tyr. & Gr. 848; Betts *v.* Gibbins (1834), 2 Ad. & E. 57; 4 N. & M. 64; Dixon *v.* Fawcus (1861), 30 L. J. Q. B. 137; 3 El. & El. 537.

(*m*) Lewin on Trusts, p. 1040 (9th ed.); and see Ramskill *v.* Edwards (1885), 31 Ch. D. 100; 55 L. J. Ch. 81.

may, if it thinks fit, and notwithstanding that the beneficiary may be a married woman entitled for her separate use and restrained from anticipation, make such order as to the Court seems just, for impounding all or any part of the interest of the beneficiary in the trust estate by way of indemnity to the trustee or person claiming through him (*n*).

Company promoters or directors.

A third exception was created by the Directors' Liability Act, 1890 (53 & 54 Vict. c. 64). Section 5 provides that "Every person who by reason of his being a director, or named as a director or as having agreed to become a director, or of his having authorised the issue of the prospectus or notice, has become liable to make any payment under the provisions of this Act, shall be entitled to recover contribution, as in cases of contract, from any other person who, if sued separately, would have been liable to make the same payment" (*o*).

Limitation of principle of leading case.

In delivering judgment in the case of Palmer *v.* Wick Steam Shipping Co. (*p*) (a Scotch appeal), Lord Herschell made the following observations:—"The reasons to be found in Lord Kenyon's judgment" (in Merryweather *v.* Nixan) "so far as reported, are somewhat meagre, and the statement of the facts of the case is not less so. It is now too late to question that decision in this country; but when I am asked to hold it to be part of the law of Scotland, I am bound to say that it does not appear to me to be founded on any principle of justice or equity, or even of public policy, which justifies its extension to the jurisprudence of other countries. There has certainly been a tendency to limit its application even in England." In the case of Adamson *v.* Jarvis (*q*), Best, C. J., in delivering the judgment of the Court, referred to the case of Philips *v.* Biggs (*r*), which he said was never decided; "but the Court of Chancery seemed to consider the case of two sheriffs of Middlesex, where one had paid the damages in an action for an escape, and sued the other for contribution, as like the case of two joint obligors." He then proceeded as follows: "From the inclination of the Court in this last case, and from the concluding part of Lord Kenyon's judgment in Merryweather *v.* Nixan, and from reason, justice, and sound policy, *the rule that wrongdoers cannot have redress or contribution against each other is confined to cases where the person seeking redress must be presumed to have known*

(*n*) See the recent case of Gerson *v.* Simpson, Reitlinger, third party, [1903] 2 K. B. 197.

(*o*) Trustee Act, 1893 (56 & 57 Vict. c. 53), s. 45.

(*p*) [1894] A. C. 318; 71 L. T. 163.

(*q*) (1827), 4 Bing. 66; 12 Moore, 241.

(*r*) (1735), Hard. 161.

that he was doing an unlawful act. If the view thus expressed by the Court of Common Pleas be correct (and I see no reason to dissent from it), the doctrine that one tortfeasor cannot recover from another is inapplicable to a case like that now under consideration."

Each joint tortfeasor liable for whole damage.

When several persons join in committing a tort, the person injured may select one particular tortfeasor as his victim, and make him pay all the damages. Thus, in an action against the huntsman of the Berkeley hounds for destroying fences and injuring crops, it was held that the defendant, being a co-trespasser, was *liable for the whole of the damage done*, not merely for what he had *individually* occasioned (*s*).

Effect of judgment against one joint tortfeasor.

Judgment recovered against one joint tortfeasor is a bar to an action against the others for the same cause, although the judgment remains unsatisfied (*t*).

A covenant not to sue one of two joint tortfeasors does not operate as a release so as to discharge the other (*u*).

Ratification of tort.

A man for whose benefit a tort is committed may afterwards ratify and adopt it (*x*). "But to make a man a trespasser by relation from having ratified and adopted an act of trespass done in his name and for his benefit, it must be shown that the act was ratified and adopted by him with full knowledge of its being a trespass, or of its being tortious, or it must be shown that in ratifying and taking the benefit of the act he meant to take upon himself, without inquiry, the risk of any irregularity which might have been committed, and to adopt the transaction, right or wrong" (*y*).

(*s*) Hume *v.* Oldacre (1816), 1 Stark. 351; 18 R. R. 779. And the same rule applies in the Admiralty Court, see The Thomas Joliffe or The Avon, [1891] P. 7; 63 L. T. 712; and The Englishman, [1895] P. 212; 64 L. J. P. 74.

(*t*) King *v.* Hoare (1844), 13 M. & W. 494; 14 L. J. Ex. 29; Brinsmead *v.* Harrison (1872), L. R. 7 C. P. 547; 41 L. J. C. P. 190; Buckland *v.* Johnson (1854), 15 C. B. 145; 23 L. J. C. P. 204; but see Martin *v.* Kennedy (1800), 2 B. & P. 69, where it was held that there may be several actions against different publishers of the same libel.

(*u*) Duck *v.* Mayeu, [1892] 2 Q. B. 511; 62 L. J. Q. B. 69.

(*x*) Wilson *v.* Tumman (1843), 6 M. & G. 236; 6 Scott, N. R. 894; and see Hull *v.* Pickersgill (1819), 1 B. & B. 282; 3 Moore, 612; Buron *v.* Denman (1848), 2 Ex. 167.

(*y*) Add. Torts, p. 96 (7th ed.).

Measure of Damages in Tort.

LUMLEY *v.* GYE. (1853) [141]

[2 E. & B. 216; 22 L. J. Q. B. 463.]

Mr. Lumley, the lessee and manager of the Queen's Theatre, engaged a lady to sing and perform on his boards for a period of three months. During the three months, Mr. Gye, a rival manager, persuaded her to break her engagement, and leave Mr. Lumley; and it was for this interference that the present action was brought. It was held (in spite of the dissent of Coleridge, J., who thought that such an action could only be brought when the strict relationship of master and servant existed) that the action could be maintained, and damages recovered.

Bowen *v.* Hall.

Lumley *v.* Gye was followed in the case of Bowen *v.* Hall (*z*), Lord Coleridge, C. J., however, with filial reverence, being dissentient. And the principle was re-affirmed in the case of Temperton *v.* Russell (No. 2) (*a*), and held applicable not only to cases of a person inducing others to break contracts already entered into, but also to the case of a person inducing others to refrain from entering into contracts with a third person.

This subject has recently been very fully considered and discussed in a series of cases arising out of the action of trade unions, with the result that the principles of law governing the matter have become very difficult to define, and still more difficult to apply to concrete cases. In Quinn *v.* Leatham (*b*), the House of Lords

(*z*) (1881), 6 Q. B. D. 333; 50 L. J. Q. B. 305. The *ratio decidendi* of these two cases, "that an action lies against a third person who maliciously induces another to break his contract of exclusive personal service to the detriment of the employer," being accepted, the question of remoteness of damage scarcely arises. These cases were discussed in the important judgments in the House of Lords in the great case of Allen *v.* Flood, [1898] A. C. 1; 67 L. J. Q. B. 119.

(*a*) [1893] 1 Q. B. 715; 62 L. J. Q. B. 412.

(*b*) [1901] A. C. 495; 70 L. J. P. C. 76; and see Read *v.* Friendly Society of Operative Masons, [1902] 2 Q. B. 732; 71 L. J. K. B. 994.

distinguished Allen *v.* Flood (*c*), and approved Lumley *v.* Gye (*c*) and Temperton *v.* Russell (*c*). This case, as well as the more recent decision of the Court of Appeal in the case of Glamorgan Coal Co. *v.* South Wales Miners' Federation (*d*), is dealt with *ante*, p. 200.

Vicars *v.* Wilcocks.

Before the leading case was decided, it used to be thought that the damage in respect of which an action was brought must have been the *legal* consequence of the defendant's act (*e*). If, for instance, as the consequence of the defendant's slander, a mob had ducked the plaintiff in a horse-pond, such a consequence would have been an *illegal* and unnatural consequence of the slander, and could not be taken into account in estimating the compensation to be paid by the defendant to the plaintiff. Lumley *v.* Gye, however, alters this rule by allowing the wrongful act of a third party to form part of the damage where such wrongful act might be naturally contemplated as likely to arise from the defendant's conduct.

Not too remote.

The damage, however, must not be too remote. Where, for instance, the defendant libelled a public singer, in consequence of which she broke her engagement with the plaintiff, and would not sing, the plaintiff's injury was considered too remote. So it was, too, in another case, where the manager of a theatre brought an action against a person who horsewhipped one of his actors so soundly as to prevent him from performing. The cases of Allsop *v.* Allsop (where a married lady was made ill by the defendant's imputing incontinency to her), Ward *v.* Weeks (where somebody repeated the defendant's slanderous words), and Hoey *v.* Felton (*f*) (where a young man missed an engagement through the defendant's falsely imprisoning him), may also be referred to, all being cases in which the damage was held to be too remote, and not the direct and immediate result of the defendant's wrongful act. Loss of marriage, or the hospitality of friends, by reason of the defendant's slander, is such special damage as will support an action (*g*); but the mere risk of temporal loss is not sufficient (*h*).

Looser measure of damages

The rules by which damages are assessed are much looser in tort than in contract. Juries may generally take into account all the

(*c*) *Supra*.

(*d*) [1903] 2 K. B. 545.

(*e*) See Vicars *v.* Wilcocks (1806), 8 East, 1; Lynch *v.* Knight (1861), 9 H. L. Cas. 577; 8 Jur. N. S. 724.

(*f*) Allsop *v.* Allsop (1861), 5 H. & N. 534; 29 L. J. Ex. 315; Ward *v.* Weeks (1830), 7 Bing. 211; 4 M. & P. 796; Hoey *v.* Felton (1861), 11 C. B. N. S. 142; 31 L. J. C. P. 105; and see Cobb *v.* G. W. Ry. Co., [1894] A. C. 419; 63 L. J. Q. B. 629.

(*g*) Davies *v.* Solomon (1871), L. R. 7 Q. B. 112; 41 L. J. Q. B. 10.

(*h*) Chamberlain *v.* Boyd (1883), 11 Q. B. D. 407; 52 L. J. Q. B. 277.

surrounding circumstances, and give damages not so much to compensate the plaintiff as to punish the defendant. Thus, in the action of seduction, which in point of form purports to give a recompense for loss of services, the plaintiff would recover very different damages according to the seducer's social position and the manner in which he had accomplished his purpose. So, in an action for assault, the circumstances of time, place, and manner should be taken into account; it is a greater insult to be beaten upon the Royal Exchange than in a private room (*i*). Juries, in fact, have a very wide discretion, and there seems an increasing unwillingness of the Courts to interfere with their verdicts on the ground of excessive damages (*k*). In one case (*l*), where the action was for trespassing on the plaintiff's land, and the evidence showed that the defendant had made use of very offensive language, the jury returned a verdict for £500 damages, and the Court refused to grant a new trial, saying, "Supposing a gentleman has a paved walk before his window, and a man intrudes, and walks up and down before the window, and remains there after he has been told to go away, and looks in while the owner is at dinner, is the trespasser to be permitted to say, 'Here is a halfpenny for you, which is the full extent of all the mischief I have done!' Would that be a compensation?" Reference may be made to the case of McArthur *v.* Cornwall (*m*), which was an action for the recovery of land, and for damages for conversion of its produce. It was held, in the Privy Council, that the measure of damages was the value of the produce which the lands were capable of yielding at the time they were taken possession of, after deducting the expenses of management; and further, that however wilful and long-continued the trespass may have been, there is no law which authorizes the disallowance of such expenses or the infliction of a penalty on the defendant beyond the loss sustained by the plaintiff.

in tort than in contract.

Seduction.

Assault.

Trespass.

McArthur *v.* Cornwall.

It has recently been held (*n*) that in assessing damages for trespass by tipping mining spoil on another's land, *the value of the land*

Tipping mining spoil.

(*i*) "*Atrox* injuria æstimatur vel *ex facto*, veluti si quis ab aliquo vulneratus fuerit vel fustibus cæsus; vel *ex loco*, veluti si cui in theatro vel in foro vel in conspectu Prætoris injuria facta sit; vel *ex persona*, veluti si magistratus injuriam passus fuerit. . . . Nonnunquam et *locus vulneris* atrocem injuriam facit, veluti si in oculo [vel fundamento?] quis percusserit." Just. Inst. Lib. 4, Tit. 4.

(*k*) See Lambkin *v.* S. E. Ry. Co. (1880), 5 App. Cas. 352; 28 W. R. 837; Praed *v.* Graham (1889), 24 Q. B. D. 53; 59 L. J. Q. B. 230; Roberts *v.* Owen (1889), 53 J. P. 502.

(*l*) Merest *v.* Harvey (1814), 5 Taunt. 442; 1 Marsh. 139.

(*m*) [1892] A. C. 75; 61 L. J. P. C. 1.

(*n*) Whitwham *v.* Westminster, [1896] 2 Ch. 538; 65 L. J. Ch. 741.

to the wrongdoer for the purpose for which it was used by him must be taken into consideration.

The Mediana.

The House of Lords, in the case of The Mediana (*o*), recently held that the owner of a chattel, who is wrongfully deprived of its use, may recover substantial damages for the deprivation, though he may have incurred no out-of-pocket expenses consequent thereon.

Infringement of copyright.

As to the measure of damages in the case of infringement of copyright, reference should be made to the case of Muddock *v.* Blackwood (*p*).

Dr. Phillips's case.

In Phillips *v.* The London and South Western Railway Company (*q*), it was held that, in an action against a railway company for personal injuries to a passenger—in this case a doctor of some eminence—the jury might take into their consideration, besides the pain and suffering of the plaintiff, and the expense incurred by him for medical and other necessary attendance, the loss he had sustained through his inability to continue a lucrative professional practice.

Inadequate damages.

Where it is evident that the jury have not given proper attention to all the elements of the plaintiff's claim, a new trial will be granted on the ground that the damages are insufficient (*r*).

Lord Campbell's Act.

Before 1846, the surviving relatives of a person whose death had been caused by the negligent or wrongful act of another had no remedy against the wrongdoer, because *actio personalis moritur cum persona*. This hardship was removed by Lord Campbell's Act (9 & 10 Vict. c. 93); and now, when the bread-winner of a family is taken away under such circumstances, those who are likely to be the greatest sufferers may claim compensation (if the deceased himself might have brought an action for personal injuries) from the person whose "wrongful act, neglect, or default" has caused the death. "Every such action," the Act provides, "shall be for the benefit of the wife, husband, parent (*s*), and child (*t*) of the person whose death shall have been so caused, and shall be brought by and in the name of the executor or administrator." If, how-

Wives, husbands, parents, and children.

(*o*) [1900] A. C. 113; 69 L. J. P. 35.

(*p*) [1898] 1 Ch. 58; 67 L. J. Ch. 6; and see Hildesheimer *v.* Faulkner, [1901] 2 Ch. 552; 70 L. J. Ch. 800.

(*q*) (1879), 5 C. P. D 280.

(*r*) Phillips *v.* L. & S. W. Ry. Co. (1879), 5 Q. B. D. 78; 49 L. J. Q. B. 233.

(*s*) See Hetherington *v.* N. E. Ry. Co. (1882), 9 Q. B. D. 160; 51 L. J. Q. B. 495.

(*t*) "Child" includes a child *en ventre sa mère*, but not an illegitimate child; but see Walker *v.* G. N. Ry. Co. (1891), 28 L. R. Ir. 69.

ever, there is no executor or administrator, or if he does not commence the action within six months of the death, it may be brought by those really interested (*u*). But, in either case, it must be commenced within twelve months of the death. In estimating the damages under this Act, the jury must compensate for *pecuniary* loss alone; they cannot consider the *grief* of those who have lost a dear relative (*x*). But a *reasonable expectation of pecuniary benefit* from the continuance of the life may be taken into account. The jury, for instance, may give compensation for the loss of the benefit of a superior education which the children would have received if their father had lived (*y*). *Funeral expenses* are not recoverable (*z*). The amount given is to be divided among the beneficiaries in such shares as the jury shall direct (*a*). If the deceased in his lifetime recovered damages for the injury done him, his relatives cannot bring another action after he is dead (*b*). But if a man has been fraudulently induced to accept a sum of money and sign a release by deed—by being told, for instance, that his injuries are of a very trifling nature, and that, if he got worse, he could claim fresh damages—in that case he (or, if he died, his representative) could maintain a subsequent action (*c*).

Within 12 months.

Pecuniary loss only to be compensated for.

Superior education.

Funeral expenses.

Only one action.

A policy of insurance which a person injured may have effected is not to be taken into account against him in settling the damages (*d*), but if the insurance money covers the whole consequences of the injury, he is a trustee for the insurers of the money he receives from the defendants (*e*).

Policy of insurance not to be counted.

In Bradshaw *v.* The Lancashire and Yorkshire Railway Com-

Damage to personal estate.

(*u*) 27 & 28 Vict. c. 95, s. 1.

(*x*) Blake *v.* Midland Ry. Co. (1852), 18 Q. B. 93; 21 L. J. Q. B. 233; and see Grand Trunk Ry. of Canada *v.* Jennings (1888), 13 App. Cas. 800; 58 L. J. P. C. 1; Stimpson *v.* Wood (1888), 57 L. J. Q. B. 484; 59 L. T. 218.

(*y*) Pym *v.* G. N. Ry. Co. (1863), 4 B. & S. 396; 31 L. J. Q. B. 377; but see Harrison *v.* L. & N. W. Ry. Co. (1885), 1 C. & E. 540.

(*z*) Dalton *v.* S. E. Ry. Co. (1858), 27 L. J. C. P. 227; 4 C. B. N. S. 296.

(*a*) Sect. 2; and see Springett *v.* Balls (1866), 7 B. & S. 477.

(*b*) Read *v.* G. E. Ry. Co. (1868), L. R. 3 Q. B. 555; 18 L. T. 82. The statute gives to the personal representatives of a person killed by the wrongful act of another, not an independent cause of action, but a right of action where there was a subsisting cause of action at the time of the death. See 9 B. & S. 714; 37 L. J. Q. B. 278; and Haigh *v.* Royal Mail Steam Packet Co. (1883), 52 L. J. Q. B. 640; 49 L. T. 802.

(*c*) Hirschfield *v.* L. B. & S. C. Ry. Co. (1876), 2 Q. B. D. 1; 46 L. J. Q. B. 94.

(*d*) Bradburn *v.* G. W. Ry. Co. (1874), L. R. 10 Ex. 1; 44 L. J. Ex. 9.

(*e*) See Randal *v.* Cockran (1748), 1 Ves. sen. 97; Simpson *v.* Thompson (1877), 3 App. Cas. 279; 38 L. T. 1; Clark *v.* Blything (1823), 2 B. & C. 254; 3 D. & R. 489; and see Bulmer *v.* Bulmer (1883), 25 Ch. D. 409; 53 L. J. Ch. 402.

pany (*f*), it was held that where a passenger on a railway was injured, and after an interval died in consequence, his executrix might recover *in an action for breach of contract* against the defendants the damage to his personal estate arising in his lifetime from medical expenses and loss occasioned by his inability to attend to business. But if the action were *in tort* (as where the deceased was run over at a level crossing), such a claim could not be supported (*g*).

Arbitration.

The 25th section of the Regulation of Railways Act, 1868 (*h*), provides for the reference to arbitration of any claim for damages in respect of injuries or death, if the parties are agreed. On joint application in writing to the Board of Trade, an arbitrator will be appointed, with power to determine the compensation, if any, to be paid.

(*f*) (1875), L. R. 10 C. P. 189; 44 L. J. C. P. 148; and see Leggott *v.* G. N. Ry. Co. (1876), 1 Q. B. D. 599; 45 L. J. Q. B. 557; Potter *v.* Met. Dist. Ry. Co. (1874), 30 L. T. 765.

(*g*) Pulling *v.* G. E. Ry. Co. (1882), 9 Q. B. D. 110; 51 L. J. Q. B. 453.

(*h*) 31 & 32 Vict. c. 119.

MISCELLANEOUS CASES.

Evidence: Hearsay.

DOE *d.* DIDSBURY *v.* THOMAS. (1811) [142]

[14 East, 323; 12 R. R. 533.]

In this case Ann Didsbury brought an action of ejectment for the Meadow Farm at Tideswell in Derbyshire. She claimed it under the will of a Mr. Samuel White, who had died some time before. The will was dated November 26th, 1754, and the chief obstacle to the plaintiff's success was to prove that the lands were the testator's at that time. In support of her case she called a witness who swore that the farm in question, together with another farm called Foxlow's Croft, were reputed to have been Sir John Statham's, and to have been purchased at the same time by Samuel White from Sir John. That of course alone did not fix any particular date. But to supplement this evidence, and make it serve the plaintiff's cause, a deed was produced dated March 25th, 1752, whereby in consideration of natural love and affection, Samuel White bargained and enfeoffed his son Edward of Foxlow's Croft, "all which said farm, &c., have been lately purchased *amongst other lands and hereditaments* by the said Samuel White of and from Sir John Statham."

It was clearly proved that Richard, the testator's eldest son, had taken possession of and occupied the Meadow Farm at the same time that his younger brother Edward had begun to occupy Foxlow's Croft; and also that the person immediately preceding Richard in the occupation of the Meadow Farm was tenant to Sir John: and the

plaintiff's counsel argued that under the circumstances the evidence of reputation could be received. It was held, however, that the evidence could not be received, as *reputation is not admissible in questions of private right.*

The reasons generally given why what another man said is not evidence are that he was not on his oath when he said it, and that he cannot be cross-examined. But the real principle of the exclusion would seem to be, that "all second-hand evidence, whether of the contents of a document or of the language of a third person, which is not connected by *responsible* testimony with the party against whom it is offered, is to be rejected" (*a*).

The chief exceptions to the rule that "hearsay is not evidence" are the following:—

1. Hearsay is admissible respecting matters of *public and general interest*, such as the boundaries of counties or parishes, claims of highway, &c. The reason for the exception in this case is that the origin of such rights is generally obscure and incapable of better proof, that people living in the district are naturally interested in local matters and likely to know about them, and that reputation cannot well exist without the concurrence of many persons who are strangers to one another, and yet equally interested. Such declarations, however, to be evidence must have been made *ante litem motam*, that is, before any dispute on the subject has arisen; although they do not become inadmissible because they were made with a view of preventing the dispute from arising (*b*). They must also be confined to *general matters*, and not touch the *particular facts* from which the general right or interest is to be inferred. "Thus, if the question be whether a road be public or private, declarations by old persons, since dead, that they *have seen repairs done upon it* will not be admissible; neither can evidence be received that a deceased person *planted a tree* near the road, and stated at the time of planting it that his object was to show where the boundary of the road was when he was a boy (*c*). So, proof of old persons having been heard to say that a *stone was erected*, or *boys whipped*, or *cakes distributed*, at a particular place, will not be admissible evidence of boundary; and where the question was whether a turnpike stood within the limits of a town, though evidence of reputation was received to show that the town extended to a certain point, yet declarations by old people, since dead, that

Ante litem motam.

Particular facts not admissible.

(*a*) Best on Evidence, p. 410 (9th ed.).
(*b*) Berkeley Peerage case (1861), H. L. Cas. 21.
(*c*) R. *v.* Bliss (1837), 7 A. & E. 550; 2 N. & P. 464.

formerly houses stood where none any longer remained, were rejected, on the ground that these statements were evidence of a particular fact" (*d*).

Questions of private right.

As the leading case shows, evidence of this kind is not admissible on questions of *private* right. In a case in which the question was who had the right to appoint to the head-mastership of Skipton-in-Craven grammar school, an old man of eighty years was produced to prove the tradition he had received from his ancestors as to the mode of election in their time, but the evidence was rejected on the ground that the question in dispute was one of private right (*e*). Similar evidence was rejected in a case (*f*) where the question was whether the sheriff of a county (Cheshire) or the corporation of the county town were charged with the duty of executing criminals. An *ex officio* information was filed by the Attorney-General against the High Sheriff for not having executed some murderers; and the chief witness for the Crown was the Clerk of Assize. In cross-examination he was asked whether he had not heard it reported amongst old people in Chester that the corporation were bound to execute. But the clerk's evidence on this point was not allowed to be given. "This," said Littledale, J., "is a private question whether the sheriffs of the county or the city are to perform a duty. The citizens of Chester may, perhaps, have a particular interest; and how do we know that there may not be a grant of felons' goods to them? However this matter may be, the question is immaterial to the public."

It seems to be a doubtful point whether evidence of reputation can be given to prove or disprove a private prescriptive right or liability in which the public is interested. Such evidence, however, was admitted in a case in which the inhabitants of a county, being indicted for non-repair of a public bridge, pleaded that certain specified persons were bound *ratione tenuræ* to repair it (*g*).

Public documents.

It is, too, a well established rule of law that public documents are admissible for certain purposes, where they have been made after public inquiry by a public officer. The word "public" is not to be taken in the sense of meaning the whole world. "I think," says Lord Blackburn (*h*), "an entry in the books of a manor is public in

(*d*) Taylor on Evidence, vol. i., p. 526.

(*e*) Withnell *v.* Gartham (1795), 1 Esp. 322; 6 T. R. 388.

(*f*) R. *v.* Antrobus (1835), 2 A. & E. 788; 6 C. & P. 784.

(*g*) R. *v.* Bedfordshire (1855), 4 E. & B. 535; 24 L. J. Q. B. 81.

(*h*) Sturla *v.* Freccia (1880), 5 App. Cas. at p. 643; 50 L. J. Ch. 16; and see Jenkins *v.* Dunraven (1898), 62 J. P. 661, where an ancient survey of a manor was held admissible, though not conclusive, evidence in a question relating to lands within the manor.

the sense that it concerns all the people interested in the manor. And an entry probably in a corporation book concerning a corporate matter, or something in which all the corporation is concerned, would be 'public' within that sense. But it must be a public document, and it must be made by a public officer. I understand a public document to mean a document that is made for the purpose of the public making use of it, and being able to refer to it. It is meant to be where there is a judicial, or quasi-judicial, duty to inquire." And it has recently been held (*i*), in an action for trespass to a several fishery, that entries of the names of tenants in parish rate-books were admissible in proof of ownership of the fishery by the plaintiff's predecessors in title. But, on the other hand, it was held in the recent case of Reg. *v.* Berger (*k*) that a map attached to an old inclosure award, showing a highway existent at the date of the award, was not admissible as evidence of reputation to prove the boundaries of the highway at that date against a person whose property adjoined the highway, but over which the Inclosure Commissioners had no jurisdiction. But a township map, produced from proper custody, made by a competent surveyor (since deceased) who was conversant with the *locus in quo*, and which map had been recognised by the parish authorities for rating purposes, was recently held admissible in evidence upon an issue raising a question of public or general right in a part of the township; and a tithe map is admissible on a similar issue (*l*).

Matters ecclesiastical.

The Ecclesiastical Courts may consult ancient authors, historical and theological works, pictures, engravings, and other ancient documents with respect to the practice of the primitive Church, the ritual of the Eastern and Western Churches, the position of the Lord's table, the position of the celebrant at the table, and like questions, which are beyond the reach of living memory (*m*).

Pedigree.

2. Hearsay is admissible in matters of *pedigree*, where the pedigree to which the declarations relate is directly in issue.

"The question is, which of three sons (Fortunatus, Stephanus, and Achaicus) born at a birth is the eldest.

"The fact that the father said that Achaicus was the youngest, and he took their names from St. Paul's Epistles (see 1 Cor. xvi.

See also [1899] 2 Ch. 121; 68 L. J. Ch. 589.

(*i*) Smith *v.* Andrews, [1891] 2 Ch. 678; 65 L. T. 175; but see *In re* De Burgho's Estate (1896), 1 Ir. R. 274.

(*k*) [1894] 1 Q. B. 823; 63 L. J. Q. B. 529.

(*l*) Smith *v.* Lister (1895), 64 L. J. Q. B. 154; 72 L. T. 20; distinguishing Wilberforce *v.* Hearfield (1877), 5 Ch. D. 709; 46 L. J. Ch. 584.

(*m*) Read *v.* Lincoln (Bishop), [1892] A. C. 644; 62 L. J. P. C. 1.

17), and the fact that a relation present at the birth said that she tied a string round the second child's arm to distinguish it, are relevant" (*n*).

Such declarations, together with inscriptions on tombstones, entries in family bibles, and the like, are admissible on the principle that they are the natural effusions of a person who must know the truth, and has no motive for misrepresenting it. As in the last case, the declarations must have been made *ante litem motam;* and it is now settled that the persons making them must have been, not merely servants, friends, or neighbours, but members of the family (*o*).

And such statements by deceased members of the family may be proved, not only by showing that they actually made the statements, but by showing that they acted upon them, or assented to them, or did anything that amounted to showing that they recognised them (*p*).

Ancient documents.

3. Hearsay is admissible in favour of ancient documents when tendered in support of *ancient possession*.

"The proof of ancient possession," said Willes, J., in a disputed fishery case (*q*), "is always attended with difficulty. Time has removed the witnesses who could prove acts of ownership of their personal knowledge, and resort must necessarily be had to written evidence. In some cases written statements of title are admitted even when they amount to mere assertion, as in the case of a right affecting the public generally; but the entry now under consideration is admissible according to a rule equally applicable to a fishery in a private pond as to one in a public navigable river. That rule is, that ancient documents coming out of proper custody, and purporting upon the face of them to show exercise of ownership, such as a lease or a licence, may be given in evidence without proof of possession or payment of rent under them as being in themselves acts of ownership and proof of possession. This rule is sometimes stated with the qualification, provided that possession is proved to have followed similar documents, or that there is some proof of actual enjoyment in accordance with the title to which the documents relate. And certainly in the case of property allowing of continuous enjoyment, without proof of actual exercise of the

(*n*) Stephen on Evidence, p. 43 (5th ed.); and see Haines *v.* Guthrie (1884), 13 Q. B. D. 818; 53 L. J. Q. B. 521; *In re* Thompson (1887), 12 P. D. 100; 56 L. J. P. 46.

(*o*) Shrewsbury Peerage case (1858), 7 H. L. Cas. 1.

(*p*) Per Blackburn, L. J., in Sturla *v.* Freccia, *supra*, at p. 613.

(*q*) Malcolmson *v.* O'Dea (1863), 10 H. L. Cas. 593; 9 L. T. 93; and see Blandy-Jenkins *v.* Earl of Dunraven, [1899] 2 Ch. 121; 68 L. J. Ch. 589.

right, any number of mere pieces of paper or parchment purporting to be leases or licences ought to be of no avail. It may be a question whether the absence of proof of enjoyment consistent with such documents goes to the *admissibility* or only to the *weight* of the evidence; probably the *latter*."

Sir James Fitzjames Stephen, in his "Digest," does not place this class of evidence as an exception to the rule excluding hearsay, but gives the effect of it separately, thus: "Where the existence of any right of property, or of any right over property, is in question, every fact which constitutes the title of the person claiming the right, or which shows that he, or any person through whom he claims, was in possession of the property, and every fact which constitutes an exercise of the right, or which shows that its exercise was disputed, or which is inconsistent with its existence, or renders its existence improbable, is relevant.

"*Illustrations.*—(a.) The question is whether A. has a right of fishery in a river. An ancient *inquisitio post mortem*, finding the existence of a right of fishery in A.'s ancestors, licences to fish granted by his ancestors, and the fact that the licensees fished under them, are deemed to be relevant (*r*).

"(b.) The question is whether A. owns land. The fact that A.'s ancestors granted leases of it is deemed to be relevant" (*s*).

Documents *more than thirty years old* are presumed to be in the handwriting of the persons who purport to have written them, provided they are produced from such custody as the judge considers proper (*t*). But it has recently been held, where an attorney has executed such a document purporting to be an appointment under a discretionary power, the Court will not assume that the attorney was authorized to and could lawfully make the appointment in the absence of any evidence to that effect (*u*).

Entries against interest.

4. Hearsay is admissible in favour of *declarations made by persons since deceased against their interest.*

On this subject, see Higham *v.* Ridgway, *post*, p. 619.

Entries in course of business.

5. Also in favour of declarations made by such persons in the *ordinary course of their business.*

On this subject, see Price *v.* Torrington, *post*, p. 619.

Dying declarations.

6. Hearsay is admissible sometimes in favour of *dying declarations.*

This, however, is confined to criminal law. And even then a

(*r*) Rogers *v.* Allen (1808), 1 Camp. 309; 10 R. R. 689.

(*s*) Doe d. Egremont *v.* Pulman (1842), 3 Q. B. 622.

(*t*) See Broom's Legal Maxims, p. 898 (6th ed.).

(*u*) *In re* Airey, Airey *v.* Stapleton, [1897] 1 Ch. 164; 66 L. J. Ch. 152.

dying declaration is only admitted when the death of the person making the declaration is the subject of the charge, and the circumstances of the death the subject of the dying declaration. This may sound a Hibernianism, but a little thought will convince the reader that it is not. The declaration, too, must be made when the declarant has no hope of recovery and is in actual danger of death.

7. In criminal cases, evidence is admissible to show that the accused bears a good character. Character.

Counsel defending prisoners sometimes ask a witness to character "*Do you believe* the prisoner to be an honest man?" Such a question is, however, irregular; it is not the belief of the witness that is admissible in evidence, but the general reputation borne by the prisoner amongst his neighbours.

So, too, in a civil action, evidence of character may become relevant. Thus, in one case (*x*), a Yarmouth grocer named Watson wanted some cheese; so he wrote to a cheese-factor at Leicester asking for some, and said another Yarmouth grocer named Bumpstead would answer for him. On receiving this application the cheese-factor wrote to Bumpstead, and asked him about Watson. Bumpstead replied that to the best of his knowledge Watson was a trustworthy person. Watson turned out an unsatisfactory customer, and the cheese-factor went to law with Bumpstead for a fraudulent misrepresentation. In defence, Bumpstead called a witness who was asked by the defendant's counsel, "Was Watson on the 24th of October, 1860, trustworthy to your belief?" The question was held admissible, as tending to show that Bumpstead made the representation in good faith. Bramwell, B., however, dissented on the ground that the question was one as to the witness's *belief*, and not as to Watson's reputation; and see Scott *v.* Sampson (1882), 8 Q. B. D. 491; 51 L. J. Q. B. 380. Sheen *v.* Bumpstead.

8. Spoken words may, too, sometimes become admissible as forming part of the transaction, or, as it is technically called, as part of the *res gestæ*. Part of *res gestæ*.

Exclamations at the time of an assault, for instance, can be given in a subsequent action. Upon the trial of an indictment for rape, or other kindred offences against women or girls, the fact that a complaint was made by the prosecutrix shortly after the alleged occurrence, *and the particulars of such complaint*, may, so far as they relate to the charge against the prisoner, be given in evidence on the part of the prosecution, not as being evidence of the facts complained of, but as evidence of the consistency of the conduct of Reg. *v.* Lillyman.

(*x*) Sheen *v.* Bumpstead (1863), 2 H. & C. 193; 10 Jur. N. S. 242.

the prosecutrix with the story told by her in the witness-box and as negativing consent on her part. An elaborate judgment of the Court of Crown Cases Reserved, in which all the earlier cases on this point were reviewed, was recently delivered by Hawkins, J.: "After very careful consideration," said that learned judge, "we have arrived at the conclusion that we are bound by no authority to support the existing usage of limiting evidence of the complaint to the bare fact that a complaint was made, and that reason and good sense are against our doing so . . . . the judgment is that the whole statement of a woman containing her alleged complaint should, so far as it relates to the charge against the accused, be submitted to the jury as part of the case for the prosecution" (*y*). This decision, however, only applies to cases where consent is material (*z*).

Bankers' Books Evidence Act.

9. Under the Bankers' Books Evidence Act, 1879 (*a*), a copy of any entry in a banker's book is admissible as *primâ facie* evidence of such entry, and of the matters, transactions and accounts therein recorded; but it must be first proved that the book was at the time of the making of the entry one of the ordinary books of the bank, and that the entry was made in the usual and ordinary course of business, and that the book is in the custody or control of the bank; and it must be further proved that the copy has been examined with the original entry and is correct. The following cases under this Act may be referred to:—Arnott *v.* Hayes (1887), 36 Ch. D. 731; 56 L. J. Ch. 844; Howard *v.* Beall (1889), 23 Q. B. D. 1; 58 L. J. Q. B. 384; Parnell *v.* Wood, [1892] P. 137; 66 L. T. 670; Kissam *v.* Link, [1896] Q. B. 574; 65 L. J. Q. B. 433; Pollock *v.* Garle, [1898] 1 Ch. 1; 66 L. J. Ch. 788; South Staffordshire Tramways *v.* Ebbsmith, [1895] 2 Q. B. 669; 65 L. J. Q. B. 96.

(*y*) Reg. *v.* Lillyman, [1896] 2 Q. B. 167; 65 L. J. M. C. 195. See also Reg. *v.* Rowland (1898), 62 J. P. 459.

(*z*) Rex *v.* Kingham (1902), 66 J. P. 393.

(*a*) 42 Vict. c. 11.

Evidence: Declarations by Persons since deceased.

PRICE *v.* TORRINGTON. (1703) [143]

[1 Salk. 285.]

This was an action by a brewer against a noble lord for beer which his household had drunk. The practice at the plaintiff's brewery was for the draymen who had taken out beer during the day to sign their names in a book kept for the purpose before they went home. The particular drayman who had taken Lord Torrington his beer was dead, but he had duly made his entry, and the question was whether it was admissible evidence for the plaintiff. It was held that it was, on the ground that it was an entry made *by a disinterested person in the ordinary course of his business.*

HIGHAM *v.* RIDGWAY. (1808) [144]

[10 East, 109; 10 R. R. 235.]

When was William Fowden born? On the answer to this question depended large estates in the county of Chester. Elizabeth Higham laid claim to them by virtue of a certain remainder; but those who contested her right said that her remainder had been barred by a recovery suffered on April 16th, 1789, by one William Fowden, since deceased. Mrs. Higham's answer to this was, that on the day named William Fowden had not yet come of age, and was therefore incapable of suffering recoveries and barring remainders. So it was that it was strenuously disputed on which side of April 16th, 1768, the late Mr. Fowden had been born. Was he or was he not of

age on April 16th, 1789? It was of course the object of Mrs. Higham to make out that he was born later than April 16th; and the most important piece of evidence she adduced in support of that view was an entry in the diary of a man-midwife who, like Fowden, had long since joined the majority. In that diary, under the head of April 22nd, 1768, there was this important entry:—

"W. Fowden, jun.'s wife,
"Filius circa hor. 3 post merid. natus H.
"W. Fowden, jun.,
"Ap. 22, filius natus
"Wife, £1 6*s.* 1*d.*
"*Paid*, 25 Oct. 1768."

This entry was admitted in evidence on the ground that it was a declaration *against interest*, the law shrewdly suspecting that no one would put himself down as paid when he had not been.

These two cases establish that statements made by deceased persons are admissible in evidence when they were made in the usual course and routine of business, or when they were made against the interest of the declarant. In order that a statement may be admissible as falling within the first of these two classes, it must satisfy four conditions (*b*): "(1.) That it is an entry of a transaction effected or done by the person who makes the entry, (2.) that it is an entry made at the time of such transaction or near to it, (3.) that it is made in the usual course and routine of business by that person, and (4.) that he was at that time a person who had no interest to misstate what had occurred." Moreover, the reader must carefully notice that when the entry is admissible as having been made in the ordinary course of the deceased person's business *only so much of the entry as it was the man's duty* to make is admissible; any other fact which happens to be stated in the entry, no matter how naturally it occurs, is excluded. Thus, in one well-known case (*c*) it became necessary to show that a person had been

Four conditions.

Extra information.

(*b*) Per Brett, L. J., in Polini *v.* Gray (1879), 12 Ch. D. 438; 49 L. J. Ch. at p. 49.

(*c*) Chambers *v.* Bernasconi (1834), 1 C. M. & R. 347; 4 Tyr. 531.

arrested in South Molton Street. The officer who arrested him had died since the arrest, but it was proposed to put in evidence a certificate made by him at the time of the arrest, which specified, with other circumstances, *the place* of the arrest. It was held, however, that although the certificate would have been admissible to establish the fact of the arrest, it could not be accepted in evidence to show where the arrest had taken place, inasmuch as the duty of the officer was to annex to the writ a certificate stating merely the fact of the arrest, and not the particulars attending it. Place of arrest.

A different rule, however, prevails as to entries admissible by reason of being contrary to interest. Not only is the entry allowed to prove the particular fact which is against the writer's interest (*e.g.*, that he has been paid), but any other facts which may happen to be stated in the entry. It will be seen that, if this had not been so, Mrs. Higham would not have been able to prove by the entry produced the date of Mr. Fowden's birth, for the only part of that entry which was contrary to interest was the acknowledgment of payment, and that fact, however interesting, would scarcely have aided the good woman's contention.

The word interest in the expression "contrary to interest" refers exclusively to *pecuniary* or *proprietary* interest. An entry (*d*), for instance, by a deceased clergyman to the effect that he had performed a certain marriage was not allowed to be given in evidence to prove the marriage merely because the marriage had been performed under circumstances which would have rendered the officiating clergyman liable to a criminal prosecution. Provided, however, that a pecuniary interest in fact exists, the Courts are not critical in weighing the amount of it. Meaning of "interest."

In an action (*e*) for indemnity in respect of certain shares purchased in the name of the plaintiff as trustee, the plaintiff sought to prove that the shares were purchased for one of the defendants by his stockbroker. To establish this the plaintiff tendered in evidence an entry made by the stockbroker, who had died before the trial, in his day-book. The entry was, however, ruled to be inadmissible, because it might, according to the turn of the market, have proved *available for the advantage of the stockbroker* as well as against him. Nor was the entry allowed to be received on the ground that it had been made in the ordinary course of business, and for this reason: the entry was not made by the broker in *the discharge of any duty by him*. The day-book in which the entry was made was kept by the broker simply for his own convenience. Massey *v.* Allen.

(*d*) Sussex Peerage case (1844), 11 C. & F. 85, at p. 108; 8 Jur. 793.

(*e*) Massey *v.* Allen (1879), 13 Ch. D. 558; 49 L. J. Ch. 76.

It appears to be a moot point whether a declaration is admissible as contrary to interest when it is the *only evidence of the charge* of which it shows the subsequent payment (*f*).

Admissions by persons in possession of land.

The statements of persons in possession of land explanatory of the character of their possession are, if made in disparagement of the declarant's title, good evidence. But the declarations of owners who have a limited interest in the property will not avail against reversioners or remaindermen (*g*).

Verbal declarations.

The reader will understand that not only are the *written entries* of a deceased person admissible, but also his *verbal declarations*, when made under circumstances which satisfy the requisite conditions. As the late Lord Justice Thesiger observed (*h*), "The principle upon which written entries of a deceased person are admissible in evidence is this, that, in the interests of justice, where a person who might have proved important material facts in an action is dead, his statements before death—I pass over for the moment whether in writing or verbal—relating to that fact are admissible, provided there is a sufficient guarantee that the statements made by him were true. It is considered, and properly considered, that where the statements made by a person were statements against his interest, those statements, at all events in the general run of cases, would probably be true. Now, is there any reason in principle why there should be a distinction made between the written entries of such a deceased person under such circumstances and his verbal declarations? I can see no reason. When the statements are merely verbal, there is every reason for watching more carefully the evidence by which those declarations are proved; but provided you are satisfied the declarations were in fact made, there is no reason whatever why there should be any distinction between the admissibility of the verbal declarations and the admissibility of the written entries."

It was the practice that the proceedings of the Provost and Fellows of King's College, Cambridge, should be entered in a book, and that the entries should be signed by the registrar of the college, who was a notary public, and who signed the entries in that character. One or two of the entries were not so signed. It was decided that an unsigned entry was not admissible in evidence, notwithstanding that it was proved to be in the handwriting of

(*f*) Doe d. Gallop *v.* Vowles (1833), 1 Mo. & Rob. 261; R. *v.* Heyford (1854), 2 S. L. C.

(*g*) R. *v.* Exeter (1869), L. R. 4 Q. B. 341; 38 L. J. M. C. 126; Crease *v.* Barrett (1835), 1 C. M. & R. 917; 5 Tyr. 458.

(*h*) Bewley *v.* Atkinson (1879), 13 Ch. D. 283; 49 L. J. Ch. at p. 160.

the person who usually made the entries at the time when it was made (*i*).

F. was tenant to C. with a promise of a lease for twenty-one years from September, 1851, to September, 1872, at the rent of £84 16*s*. Afterwards C. entered F.'s name in his rent-book as the tenant of 128 acres at 16*s*. an acre, at yearly rent of £102 8*s*., less £4 for county cess £98 8*s*. "Tenure thirty-one years from September, 1872, at rent of 16*s*. per acre, allowed £4 for county cess." The entry was in C.'s handwriting. Held that it was admissible in evidence as a statement against the proprietary and pecuniary interest of C. (*k*).

Neither proof of an entry made by a deceased person in the ordinary course of business in a postage book of a letter to be posted, nor proof of possession by the deceased person for the purpose of posting, is sufficient evidence of posting (*l*). And consult Newbould *v.* Smith (1886), 14 App. Cas. 423; 61 L. T. 814; *Ex parte* Edwards, *In re* Tollemache (1884), 14 Q. B. D. 415; *Ex parte* Revell, *In re* Tollemache (1884), 13 Q. B. D. 720; 54 L. J. Q. B. 89; *In re* Turner, Glenister *v.* Harding (1885), 29 Ch. D. 985; 53 L. T. 528; the Lovat Peerage case (1885), 10 App. Cas. 763.

The admissibility in evidence of a solicitor's books after his death was discussed in the recent case of Bradshaw *v.* Widdrington (*m*).

Highways.

DOVASTON *v.* PAYNE. (1795) [145]

[2 H. Bl. 527; 3 R. R. 497.]

This was an action for wrongfully taking and impounding cattle, and the legal gentleman who drew the pleadings for the plaintiff ruined his case by saying that the cattle

(*i*) Fox *v.* Bearblock (1881), 17 Ch. D. 429; 50 L. J. Ch. 487; and see Dysart Peerage case (1881), 6 App. Cas. 489.

(*k*) Conner *v.* Fitzgerald (1883), 11 L. R. Ir. 106.

(*l*) Rowlands *v.* De Vecchi (1882), 1 C. & E. 10; and see Dodds *v.* Tuke (1884), 25 Ch. D. 617; 53 L. J. Ch. 598.

(*m*) [1902] 2 Ch. 430; 71 L. J. Ch. 627.

were "*in*" the highway, when he ought to have been careful to say that they were "*passing along*" it.

What is a highway?

A highway may be defined as *a passage which all the King's subjects have a right to use*. Of highways there are several kinds; such as footpaths, turnpikes, streets, and public rivers. So, too, a *cul de sac* may be a highway just as much as a through thoroughfare (*n*).

Easement.

The amount of interest that the public have in a highway is well put by Heath, J., in Dovaston *v.* Payne:—"The property is in the owner of the soil, subject to an easement for the benefit of the public." An easement, nothing more. The public have a right to use it for all the purposes of a highway; but, subject to the public easement, the right of property remains in the owner of the soil.

Pheasant shooting in the highway.

Thus, in R. *v.* Pratt (*o*), the appellant, whilst on a highway, carrying a gun, had sent a dog into a covert on one side of the highway. Immediately afterwards a pheasant flew across the highway, at which he fired. Under these circumstances, the appellant was held rightly convicted of trespass on the highway under the Day Poaching Act. Lord Campbell observed: "No doubt the appellant was a trespasser when he went upon the highway as he did for the purpose of searching for game, and for that purpose only, and I think he must be considered as being in search of game *there*."

Presumption of ownership.

In the absence of any express evidence to the contrary, the ordinary presumption is that the landowners on either side of the highway are entitled to the soil of the road which bounds their land *usque ad medium filum viæ*. This presumption is doubtless founded on the assumption "that in making a road for public convenience, the owners of the adjoining land have sacrificed a portion of their property in order to devote it to public purposes" (*p*). And where the presumption arises, as will readily be supposed, the rule is that the sale of an estate bounded by roads operates to pass to the pur-

(*n*) Vernon *v.* Vestry of St. James, Westminster (1880), 16 Ch. D. 449; 50 L. J. Ch. 81. See also Bourke *v.* Davis (1889), 44 Ch. D. 110; 62 L. T. 34.

(*o*) (1855), 4 El. & B. 860; 24 L. J. M. C. 113. This case was approved by the Court of Appeal in Harrison *v.* Rutland (Duke), [1893] 1 Q. B. 142; 62 L. J. Q. B. 117; which was followed in Hickman *v.* Maisey, [1900] 1 Q. B. 752; 69 L. J. Q. B. 511; and see L. & N. W. Ry. Co. *v.* Westminster Corporation, [1902] 1 Ch. 269; 71 L. J. Ch. 34.

(*p*) Per Cockburn, C. J., in Leigh *v.* Jack (1879), 5 Ex. D. 264; 49 L. J. Ex. 222; and see Merrett *v.* Bridges (1883), 47 J. P. 775; R. *v.* Dover (1884), 32 W. R. 876; 49 J. P. 86; R. *v.* Local Government Board (1885), 15 Q. B. D. 70; 54 L. J. M. C. 104; Marshall *v.* Taylor, [1895] 1 Ch. 641; 64 L. J. Ch. 416; and Littledale *v.* Liverpool College, [1900] 1 Ch. 19; 69 L. J. Ch. 87.

chaser the property in the soil of those roads *usque ad medium filum viæ*. And this rule extends to streets in towns, and the presumption is not rebutted by the circumstance that the grantor is the municipal authority entitled to part of the soil of the other half of the street (*q*). It must not, however, be forgotten that this presumption is capable of being easily rebutted, as, for example, by showing that the road was originally set out under an Inclosure Act; and, indeed, in all districts in which the Public Health Act, 1875, is in force, the soil of the highway is vested in the local authority, but only to such a depth as is usually required for the ordinary work which the authority would need to execute in and upon the highway (*r*).

It may, too, be added that the presumption as to the ownership of the soil of waste land adjoining a road is that it belongs to the owner of the adjoining enclosed land, and not to the lord of the manor (*s*).

Dedication of highway.

The dedication of a highway to the public is a question of *intention*, such intention, however, being capable of being inferred from long user. "If the owner of the soil throws open a passage, and neither marks by any visible distinction that he means to preserve all his rights over it, nor excludes persons from passing through it by positive prohibition, he shall be presumed to have dedicated it to the public. Although the passage in question was originally intended only for private convenience, the public are not now to be excluded from it, after being allowed to use it so long without any interruption" (*t*). But the user by the public is merely evidence of the intention to dedicate, and a single act of interruption by the owner is of much more weight upon a question of intention than many acts of enjoyment (*u*). Of course, if the act of dedication be unequivocal, the dedication may take place immediately.

(*q*) *In re* White's Charities, Charity Commissioners *v.* London Corporation, [1898] 1 Ch. 659; 67 L. J. Ch. 430; but see Mappin *v.* Liberty, [1903] 1 Ch. 118; 72 L. J. Ch. 63; *semble*, the presumption does not apply to building estates or schemes. *Quære*, whether the presumption applies to leases or to grants from the Crown. *Ib.*

(*r*) Coverdale *v.* Charlton (1878), 4 Q. B. D. 104; 48 L. J. Q. B. 128.

(*s*) Doe d. Pring *v.* Pearsley (1827), 7 B. & C. 304; 9 D. & R. 908.

(*t*) Per Ellenborough, C. J., in King *v.* Lloyd (1808), 1 Camp. 260; but see Wood *v.* Veal (1822), 5 B. & Ald. 454; 1 D. & R. 20; Hall *v.* Corporation of Bootle (1881), 44 L. T. 873; 29 W. R. 862. See also Grand Junction Canal Co. *v.* Petty (1888), 21 Q. B. D. 273; 57 L. J. Q. B. 572; Eyre *v.* New Forest Highway Board (1892), 56 J. P. 517; Robinson *v.* Cowpen Local Board (1893), 63 L. J. Q. B. 235; 9 R. 858.

(*u*) Per Parke, B., in Poole *v.* Huskinson (1843), 11 M. & W. 827.

Limited dedication.

It is, moreover, worthy of remark that the dedication of the highway may be limited as to purpose, *e.g.*, it may be for all purposes except that of carrying coal (*x*), or as in the case of a bridge which is to be used only when the river is so swollen that persons attempting to ford it would be drowned, or of a footway which is liable to be ploughed up occasionally. But the dedication must be general to the public, and not merely to a limited part of the public, as a particular parish (*y*); such a partial dedication is simply void, and will not operate in law as a dedication to the whole public.

Take it as you find it.

It is to be observed, also, that a highway may be dedicated with an obstruction on it, so that the dedicator would not be responsible for an accident happening by reason thereof (*z*).

Can a lessee dedicate?

In one case (*a*) the point arose (though it became unnecessary to decide it) whether a lessee can dedicate to the public. Probably, however, it may be said that he has no such power, at any rate except as against himself and his assignees. But it is to be remembered that long user, as of right, and openly, is evidence from which assent on the part of the owner, whoever he may be, is *primâ facie* to be inferred. The burden lies upon the person who seeks to deny the inference from such user, to show negatively that the state of the title was such that the dedication was impossible, and that no one capable of dedicating existed (*b*).

Mending the roads.

The obligation of repairing a highway generally falls on the occupiers of land in the parish through which the highway runs; but it is not within the scope of this work to describe the machinery provided for the execution of these repairs by the various highway authorities, *e.g.*, surveyors of highways, highway boards, and county and parish councils (*c*). It may, however, be mentioned that, when

(*x*) Stafford *v.* Coyney (1827), 7 B. & C. 257; 5 L. J. K. B. 285.

(*y*) Hildreth *v.* Adamson (1860), 8 C. B. N. S. 587; 30 L. J. M. C. 204.

(*z*) Fisher *v.* Prowse (1862), 2 B. & S. 770; 31 L. J. Q. B. 212.

(*a*) Att.-Gen. *v.* Biphosphated Guano Co. (1879), 11 Ch. D. 327; 49 L. J. Ch. 68.

(*b*) See Powers *v.* Bathurst (1880), 49 L. J. Ch. 294; 42 L. T. 123.

(*c*) Of the immense number of cases as to the repair of highways, the following are the most recent: Tunbridge Highway Board *v.* Sevenoaks Highway Board (1885), 33 W. R. 306; 49 J. P. 340; Lapthorn *v.* Harvey (1885), 49 J. P. 709; Lancaster Justices *v.* Newton Improvement Commissioners (1886), 11 App. Cas. 416; 56 L. J. M. C. 17; Leek Improvement Commissioners *v.* Staffordshire Justices (1888), 20 Q. B. D. 794; 57 L. J. M. C. 102; Sheppey Union *v.* Elmley Overseers (1886), 17 Q. B. D. 364; 55 L. J. M. C. 176; *In re* Warminster Local Board (1890), 25 Q. B. D. 450; 59 L. J. Q. B. 434; Reg. *v.* Barker (1890), 25 Q. B. D. 450; 59 L. J. M. C. 105; Derby County Council *v.* Matlock Bath District Council, [1896] A. C. 315; 65 L. J. Q. B. 419; Burslem Corporation *v.* Staf-

a road was dedicated to the public, at common law the consequence followed that it became repairable by the inhabitants of the parish or district. But now, under the provisions of the General Highway Act, 1835, the inhabitants cannot be compelled to repair a road so dedicated as a highway unless certain things are done—amongst others, unless the road be made in a substantial manner and to the satisfaction of the highway authorities (*d*).

Private person having to do it.

Sometimes, too, the burden of repairing falls on a private person by prescription, or *ratione tenuræ*, *i.e.*, by reason of the tenure of lands. It should, however, be observed that the obligation to repair is confined to the *occupier* of the lands, and creates no liability in the *owner* to repay sums so expended (*e*). So, also, a man may be bound to repair *ratione clausuræ*, *i.e.*, as the occupier of lands adjoining the highway which he has enclosed, and over which the public had a right to go in case the road became incommodious or impassable.

Stopping up highways.

"*Once a highway, always a highway*," is a familiar common law maxim; but power is now given to justices of the peace, under certain circumstances, to divert or extinguish highways; and it has been held (*f*) that when access to a highway has become impossible, in consequence of the ways leading to it having been legally stopped up, it ceases to be a highway. "The great difficulty here," said Denman, J., in the case referred to, "seems to arise from the familiar dictum, 'once a highway, always a highway,' and from the necessity of now for the first time placing a limitation on it. But I think we are compelled to hold that this is a case where that which formerly was a highway, but which, though it has not been stopped by a statutory process, has, by reason of legal acts at either end of it, ceased to be a place to which the Queen's subjects can have access, loses its character of a highway."

fordshire County Council, [1896] 1 Q. B. 24; 65 L. J. Q. B. 1.

(*d*) See per Blackburn, J., in R. *v.* Dukinfield (1863), 4 B. & S. 158; 32 L. J. M. C. 235; and see Amesbury Guardians *v.* The Justices of Wilts (1883), 10 Q. B. D. 480; 52 L. J. M. C. 64, as to the liability for the expense of removing snow.

(*e*) See Cuckfield District Council *v.* Goring, [1898] 1 Q. B. 865; 67 L. J. Q. B. 539; and Daventry Rural Council *v.* Parker, [1900] 1 Q. B. 392; 69 L. J. Q. B. 105. As to what is sufficient evidence of repairs done in the past to establish a liability to repair *ratione tenuræ*, see Rundle *v.* Hearle, [1898] 2 Q. B. 83; 67 L. J. Q. B. 741. And as to the extent to which a person liable for the repair of a highway *ratione tenuræ* is exempt from highway rates, see N. E. Ry. Co. *v.* Dalton Overseers, [1899] 1 Q. B. 1026; 68 L. J. Q. B. 640; and Ferrand *v.* Bingley District Council, [1903] 2 K. B. 445; 72 L. J. K. B. 734.

(*f*) Bailey *v.* Jamieson (1876), 1 C. P. D. 329; 34 L. T. 62; and see United Land Co. *v.* Tottenham Board of Health (1884), 13 Q. B. D. 640; 53 L. J. M. C. 136. As to the notices necessary to be given, see Reg. *v.* Surrey JJ., [1892] 1 Q. B. 867; 61 L. J. M. C. 153.

Duties of road authorities

In Kent *v.* Worthing Local Board of Health it was decided that it was the duty of the defendants to make such arrangements that works under their care should not become a nuisance to the highway, and the plaintiff recovered damages from the defendants for injuries to his horse caused by a valve cover in the road being exposed by the ordinary wear of the traffic, and causing the horse to fall (*g*). But this case has now been overruled (*h*), and it is now clearly established that a local board, being the highway authority of the district, are *not liable* for damages caused to a person in consequence of the highway being out of repair, when such non-repair is a *mere nonfeasance*.

Cowley *v.* Newmarket Local Board.

Nuisance.

Although road authorities are invested with large discretionary powers in regard to the cleaning of streets and the regulation of traffic, and a Court of law would decline to interfere with a due exercise of that discretion, they have no power or discretion in the case of a nuisance, which the Legislature has not expressly or by necessary implication sanctioned, either to commit it themselves or to authorize its commission by others (*i*).

Contractor's negligence.

As to the liability of a district council for their contractor's negligence in the repair of a highway, see Hardaker *v.* Idle District Council, and Penny *v.* Wimbledon Urban Council, *ante*, p. 482.

Parish council.

It has been held (*k*) that a parish council cannot be indicted for the non-repair of a highway.

Gas company.

As to the liability of a gas company for injury caused by their failure to properly reinstate the roadway after laying a gas main, reference should be made to the recent case of Goodson *v.* Sunbury Gas Consumers' Co. (*l*).

Dedication.

A court which was not a thoroughfare had, for seventy or eighty years, been, at all hours, open to the public, and had been paved, lighted, and cleansed by the parish vestry, and the owners of the soil were not shown to have, during that time, exercised any right of ownership over the soil of the court. It was decided by Vice-

(*g*) (1882), 10 Q. B. D. 118; 52 L. J. Q. B. 77; and see White *v.* Hindley Local Board (1875), L. R. 10 Q. B. 219; 44 L. J. Q. B. 114; Blackmore *v.* Vestry of Mile End Old Town (1882), 9 Q. B. D. 451; 51 L. J. Q. B. 496.

(*h*) See Cowley *v.* Newmarket Local Board, [1892] A. C. 345; 62 L. J. Q. B. 65; and Sydney Municipal Council *v.* Bourke, [1895] A. C. 433; 64 L. J. P. C. 140; and see Whyler *v.* Bingham Rural Council, [1901] 1 K. B. 45; 70 L. J. K. B. 207.

(*i*) Oyston *v.* Aberdeen District Tramways, [1897] A. C. 111; 66 L. J. P. C. 1; a case of salting tramway lines to melt snow; distinguished in City of Montreal *v.* Montreal Street Rail. Co., [1903] A. C. 482.

(*k*) Reg. *v.* Shipley Parish Council (1897), 18 Cox, C. C. 531; 61 J. P. 488.

(*l*) (1896), 75 L. T. 251; 60 J. P. 585.

Chancellor Malins that the court had been dedicated to the public so as to bring it under the vestry according to the Local Management Act of the Metropolis (*m*).

Indictment for obstruction.

Upon the trial of an indictment for obstructing a highway, the defendant was acquitted. It was decided that a new trial on the ground of misreception of evidence, misdirection, and that the verdict was against evidence, could not be granted (*n*). As to indictments for non-repair of highways, reference should be made to the cases of Reg. *v.* Lordsmere Inhabitants (1886), 54 L. T. 766; 16 Cox, C. C. 65; Reg. *v.* Southampton (1887), 19 Q. B. D. 590; 56 L. J. M. C. 112; Reg. *v.* Poole (Mayor) (1887), 19 Q. B. D. 602, 683; 56 L. J. M. C. 131; Reg. *v.* Wakefield (Mayor) (1888), 20 Q. B. D. 810; 57 L. J. M. C. 52.

Wilkins *v.* Day.

The defendant left an agricultural roller between the hedge and the metalled part of the road, having removed it from a field on the opposite side of the road for his own convenience. A pony, drawing a carriage in which plaintiff's wife was riding, shied at the roller, upset the carriage, and the plaintiff's wife was killed. It was decided that the roller was an obstruction to the highway; that it was an unreasonable user of the highway by the defendant, and that the plaintiff was entitled to recover damages for the death of his wife under Lord Campbell's Act (*o*).

What's the highway?

The right of the public to use a highway extends to the whole road and not merely to the part used as *via trita*. Therefore ditches fifteen inches wide and ten inches deep, cut completely across the strips of grass land at the sides of roads, so as to amount to a danger to persons walking along the strips, amount to a nuisance and obstruction (*p*). But there is no irrebuttable presumption that a strip of land left between a metalled highway and the fence of the adjoining property has been dedicated to public use as part of the highway; and the fact that the margin of such a strip adjoining the metalled road has occasionally been walked over by the public is too indefinite a use to form the foundation of a public right or to establish a dedication as part of the highway (*q*).

(*m*) Vernon *v.* Vestry of St. James, Westminster, *ante*, p. 624.

(*n*) Reg. *v.* Duncan (1881), 7 Q. B. D. 198; 50 L. J. M. C. 95. The most recent cases of obstruction of highways are: Horner *v.* Cadman (1886), 55 L. J. M. C. 110; 54 L. T. 421; Hill *v.* Somerset (1887), 51 J. P. 742; Back *v.* Holmes (1887), 57 L. J. M. C. 37; 56 L. T. 713; Reg. *v.* Justices of London (1890), 25 Q. B. D. 357; 59 L. J. M. C. 146.

(*o*) Wilkins *v.* Day (1883), 12 Q. B. D. 110; 49 L. T. 399; and see Gully *v.* Smith (1883), 12 Q. B. D. 121; 53 L. J. M. C. 35.

(*p*) Nicol *v.* Beaumont (1883), 53 L. J. Ch. 853; 50 L. T. 112; and see Att.-Gen. *v.* Esher Linoleum Co., [1901] 2 Ch. 647; 70 L. J. Ch. 808.

(*q*) Belmore *v.* Kent County

Reserved tolls.

The promoters of an intended road by deed declared that the road should not only be enjoyed by them for their individual purposes, but "should be open to the use of the public at large for all manner of purposes in all respects as a common turnpike road," *but subject to the payment of tolls by the persons using it.* It was decided that this was not a dedication of the road to the public, and that the road was not a highway repairable by the inhabitants at large under sect. 150 of the Public Health Act, 1875. It seems that, without legislative authority, an individual cannot dedicate a road to the public if he reserves a right to tolls for the user (*r*).

Traction engine.

Persons using a traction engine and trucks on a highway may be indicted for a nuisance, *e.g.*, if they create a substantial obstruction and occasion delay and inconvenience to the public substantially greater than such as would arise from the use of carts and horses (*s*).

And see the Locomotives on Highways Act, 1896 (59 & 60 Vict. c. 36), and the Locomotives Act, 1898 (61 & 62 Vict. c. 29).

Other cases.

The reader would do well to refer to the following cases:—Finch *v.* G. W. Ry. Co. (1879), 5 Ex. D. 254; 41 L. T. 731; Mayor of London *v.* Riggs (1880), 49 L. J. Ch. 297; Tillett *v.* Ward (1882), 10 Q. B. D. 17; 52 L. J. Q. B. 61; Normanton Gas Co. *v.* Pope and Pearson (1883), 52 L. J. Q. B. 629; 32 W. R. 134; The Queen *v.* Justices of Essex (1883), 11 Q. B. D. 704; 49 L. T. 394; Parkyns *v.* Preist (1881), 7 Q. B. D. 313; 50 L. J. M. C. 148; Corporation of Rochdale *v.* Justices of Lancashire (1883), 8 App. Cas. 494; 53 L. J. M. C. 5; Justices of West Riding of York *v.* The Queen (1883), 8 App. Cas. 781; 53 L. J. M. C. 41; Wallington *v.* Hoskins (1880), 6 Q. B. D. 206; 50 L. J. M. C. 19; Pickering Lythe East Highway Board *v.* Barry (1881), 8 Q. B. D. 59; 51 L. J. M. C. 17; The Queen *v.* Ellis (1882), 8 Q. B. D. 466; Alresford Rural Sanitary Authority *v.* Scott (1881), 7 Q. B. D. 210; 50 L. J. M. C. 103; Ramsden *v.* Yeates (1881), 6 Q. B. D. 583; 50 L. J. M. C. 135; Oxenhope District Local Board *v.* Bradford (Mayor) (1882), 47 L. T. 344; 31 W. R. 322; Dyson *v.* Greetland Local Board (1884), 13 Q. B. D. 946; 53 L. J. M. C. 106; Burton *v.* Salford Corporation (1883), 11 Q. B. D. 286; 52 L. J. Q. B. 668; followed in Graham *v.* Newcastle-upon-Tyne (Mayor), [1893] 1 Q. B. 643; 62 L. J. Q. B. 315; Newton Improvement Commissioners *v.* Justices of

Council, [1901] 1 Ch. 873; 70 L. J. Ch. 501; and see Harvey *v.* Truro District Council, [1903] 2 Ch. 638; 72 L. J. Ch. 705.

(*r*) Austerberry *v.* Oldham Corporation (1885), 29 Ch. D. 750; 55 L. J. Ch. 633.

(*s*) Reg. *v.* Chittenden (1885), 49 J. P. 503; 15 Cox, C. C. 725. As to obstructions by stage coaches, see R. *v.* Cross (1812), 3 Camp. 224; 13 R. R. 794. As to the negligent management of a traction engine upon a highway, see Smith *v.* Bailey, [1891] 2 Q. B. 403; 60 L. J. Q. B. 779.

Lancashire (1884), 13 Q. B. D. 623; 48 J. P. 406; affirmed 54 L. J. M. C. 1; Over-Darwen (Mayor) *v.* Lancaster (Justices) (1884), 15 Q. B. D. 20; 54 L. J. M. C. 51; Middlesbrough Overseers *v.* Yorkshire (N. R.) Justices (1884), 12 Q. B. D. 239; 32 W. R. 671; Reg. *v.* Cheshire Justices (1884), 50 L. T. 483; 48 J. P. 262; Illingworth *v.* Bulmer East Highway Board (1884), 53 L. J. M. C. 60; 32 W. R. 450. By 47 & 48 Vict. c. 52, certain Turnpike Acts are continued and certain others repealed. Loughborough Highway Board *v.* Curzon (1886), 17 Q. B. D. 344; 55 L. J. M. C. 122; Ellis *v.* Hulse (1889), 23 Q. B. D. 24; 58 L. J. M. C. 91.

Contracts made and Torts committed Abroad, &c.

FABRIGAS *v.* MOSTYN. (1775) [146]

[COWP. 161.]

In 1770 the Governor of Minorca was a gentleman named Mostyn, who apparently was of opinion that he was entitled to play the part of an absolute and irresponsible despot on his small stage. One of his subjects, however, a Mr. Fabrigas, did not coincide with him in this view, and he rendered himself so obnoxious that the governor, after keeping him imprisoned for a week, banished him to Spain.

It was for this arbitrary treatment that Fabrigas now brought an action *at Westminster*. Mostyn objected that, as the alleged trespass and false imprisonment had taken place in Minorca, the action could not be brought in England. But it was held that, as the cause of action was of a transitory and not a local nature, it could. And a British jury gave Fabrigas £3,000 damages (*t*).

Local and transitory.

Actions were formerly divided into *local* and *transitory: local*,

(*t*) See Musgrave *v.* Pulido (1879), 5 App. Cas. 102; 49 L. J. P. C. 20, as to actions against the Governor of a British colony.

such as could be tried only in the county in which the cause of action arose (*e.g.*, an action of trespass to land); *transitory*, such as could be tried wherever the plaintiff chose (*e.g.*, an action for an assault). But, through a provision of the Judicature Act, which abolishes local venue and allows the plaintiff, subject to its being changed by a judge, to name any county he pleases for the place of trial, the leading case has lost much of its old importance. The rules of procedure under the Judicature Acts with regard to local venue (Order XXXVI. r. 1) did not, however, confer any new jurisdiction. On this subject the decision of the House of Lords in the case of British South Africa Co. *v.* Companhia de Moçambique (*u*) should be consulted. It was there held (reversing the decision of the Court of Appeal) that the Supreme Court of Judicature has no jurisdiction to entertain an action to recover damages for a trespass to land situate abroad. The learned judgment delivered by Lord Herschell is well worthy of careful study.

Contracts made abroad.

The leading case may be still, however, taken to "lead" as to the law relating to contracts entered into abroad and sought to be enforced in England. Such contracts are primarily to be expounded according to the law of the place where made,—the *lex loci contractûs*, as it is called (*x*). For example, if by the French law (*y*) the property in a bill of exchange payable to order is not passed without a *special* indorsement, the holder of a bill drawn in France and there indorsed to him *in blank*, cannot sue on it here, although in the case of an English bill a blank indorsement would have sufficed (*z*). But this rule admits of an exception in the case where the parties intended the contract to be executed in a country other than that in which it was entered into. Where a contract is entered into between parties residing under different systems of law, the Court is not bound as a matter of law to apply either the *lex loci solutionis* or the *lex loci contractûs*. The question is what law the parties intended to govern the contract, as to which both these circumstances are, of course, important (*a*). Contracts which are illegal

(*u*) [1893] A. C. 602; 63 L. J. Q. B. 70.

(*x*) Jacobs *v.* Crédit Lyonnais (1884), 12 Q. B. D. 589; 53 L. J. Q. B. 156; Lee *v.* Abdy (1886), 17 Q. B. D. 309; 55 L. T. 297; *Ex parte* Dever (1887), 18 Q. B. D. 660; 56 L. J. Q. B. 552.

(*y*) Trimbey *v.* Vignier (1834), 1 Bing. N. C. 151; 6 C. & P. 25; Bradlaugh *v.* De Rin (1870), L. R. 5 C. P. 473; 39 L. J. C. P. 254; and see Horne *v.* Rouquette (1878), 3 Q. B. D. 514; 39 L. T. 219; and Alcock *v.* Smith, [1892] 1 Ch. 238; 61 L. J. Ch. 161.

(*z*) Reference, however, should now be made to sect. 72 of the Bills of Exchange Act, 1882 (45 & 46 Vict. c. 61), as to the rules prevailing where a bill drawn in one country is negotiated, accepted, or payable in another.

(*a*) Hamlyn *v.* Talisker Distillery, [1894] A. C. 202; 71 L. T. 1; South African Breweries, Ld.

according to English law, though legal according to the law of the country where made, cannot be enforced in England (*b*). "When a Court of justice in one country is called on to enforce a contract entered into in another country, the question is not only whether or not the contract is valid according to the law of the country in which it is entered into, but whether or not it is consistent with the law and policy of the country in which it is to be enforced; and if it is opposed to those laws and that policy, the Court cannot be called on to enforce it (*c*). Thus, the rule that a contract in restraint of trade is void, unless confined within what is reasonably necessary for the protection of the contractee, is a rule applicable to contracts made abroad and between aliens (*d*). And although a contract is to be expounded according to the law of the place where made, *proceedings to enforce it* are governed by the law of the place where the action is brought—the *lex loci fori*. For example, if an agreement be one of that class which the 4th section of the Statute of Frauds requires to be in writing, a verbal agreement made in a foreign country where it would have been perfectly valid cannot be enforced in England (*e*). Similarly, an action on a contract entered into in Scotland, and which might by the laws of that country have been enforced within forty years, has been held to be barred by the English Statute of Limitations (*f*).

The title to certificates of American railroad shares, those certificates being in England, and the title to them depending on dealings in England, must be decided by English law; but the consequences of the title to the certificates, with regard to the title to the shares, must be decided by American law (*g*).

Powers of attorney.

So, where a power of attorney is executed in a foreign country in the language of that country, the intention of the writer is to be ascertained by evidence of competent translators and experts, including, if necessary, lawyers of the country, as to the meaning of the language used; and if, according to such evidence, the intention appears to be that the authority shall be acted upon in

v. King, [1900] 1 Ch. 273; 69 L. J. Ch. 171; Royal Exchange Assurance Corp. *v.* Sjoforsakrings Aktie-Bolaget Vega, [1902] 2 K. B. 384; 71 L. J. K. B. 739.

(*b*) Santos *v.* Illidge (1860), 8 C. B. N. S. 861; 29 L. J. C. P. 348; *In re* Fitzgerald, Surman *v.* Fitzgerald, [1903] 1 Ch. 933; 72 L. J. Ch. 430.

(*c*) Per Turner, L. J., in Hope *v.* Hope (1857), 8 D. M. & G. 731; 26 L. J. Ch. 417; but see Kaufman *v.* Gerson, [1903] 2 K. B. 114; 72 L. J. K. B. 596.

(*d*) Rousillon *v.* Rousillon (1880), 14 Ch. D. 351; 49 L. J. Ch. 338.

(*e*) Leroux *v.* Brown (1852), 12 C. B. 801; 22 L. J. C. P. 1.

(*f*) British Linen Co. *v.* Drummond (1830), 10 B. & C. 903; 9 L. J. K. B. 213; Alliance Bank of Simla *v.* Carey (1880), 5 C. P. D. 429; 49 L. J. C. P. 781.

(*g*) Colonial Bank *v.* Cady (1890), 15 App. Cas. 267; 60 L. J. Ch. 131.

other countries, the extent of the authority in any country in which the authority is acted upon must be determined by the law of that country (*h*).

Administration of assets.

So, too, in the administration by the Court of the assets of a deceased, the *lex loci fori* applies. A good illustration of this is to be found in the recent case of *In re* Doetsch, Matheson *v.* Ludwig (*i*). The plaintiffs were creditors of a Spanish firm under an agreement executed in London. One of the Spanish firm died domiciled in London, leaving English assets, and the defendants were his executors. By Spanish law the testator's separate estate was not liable to be applied towards payment of the partnership debts until the joint estate had been resorted to or proved insufficient. It was held that this was a mere rule of procedure not affecting the rights of a creditor in this country, and the plaintiffs were therefore entitled to have the testator's estate applied towards the partnership debt after satisfaction of his separate debts without first having recourse to the joint estate or proving it insufficient.

Marriage liabilities.

By the law of Jersey, a husband is still liable for the ante-nuptial debts of his wife. In England, if the marriage has taken place since July 30, 1874, he is liable only to the extent of certain specified assets. A Jersey girl contracted debts in Jersey, and then came to England, and, after July 30, 1874, got married. The lady's Jersey creditor brought an action against the husband, urging that the *lex loci contractûs* ought to prevail, and that the husband was liable. But it was held that the husband was not liable, as, the marriage having taken place in England, the Jersey law did not apply (*k*).

Contract by letter.

It may be observed that when a contract is entered into by letter between two persons living in different countries, the place where the contract is considered to have been made, so as to determine the *lex loci contractûs*, is the place where the final assent has been given by the one party to an offer made by the other.

French "prodigal" can sue here.

The Courts of this country will not recognize a state of disability which is unknown to our laws. They will not, for instance, take notice of a personal disqualification caused by a change of *status*, not arising from the law of nature, but from the principles of the customary or positive law of a foreign country (*l*).

(*h*) Chatenay *v.* Brazilian Telegraph Co., [1891] 1 Q. B. 79; 60 L. J. Q. B. 295.

(*i*) [1896] 2 Ch. 836; 65 L. J. Ch. 855; and see *In re* Johnson, Roberts *v.* Att.-Gen., [1903] 1 Ch. 821; 72 L. J. Ch. 682.

(*k*) De Greuchy *v.* Wills (1879), 4 C. P. D. 362; 48 L. J. C. P. 726.

(*l*) Worms *v.* De Valdor (1880), 49 L. J. Ch. 261; 41 L. T. 791; followed in *In re* Selot's Trust, [1902] 1 Ch. 488; 71 L. J. Ch.

Marriage.

A union formed between a man and a woman in a foreign country, although it may there bear the name of marriage, and the parties to it may there be designated husband and wife, is not a valid marriage according to the law of England, unless it be formed on the same basis as marriages throughout Christendom, and be in its essence "the voluntary union for life of one man and one woman, to the exclusion of all others" (*m*).

De Nicols *v.* Curlier.

When a marriage is celebrated in a foreign country and the spouses subsequently become naturalised British subjects, the rights, whether constituted by the law of the land or by convention between the parties, vested in them respectively at the marriage in regard to movable property remain unaffected by the change of domicil (*n*).

Divorce.

The validity of a marriage contracted in England, though the domicil of one of the parties may be foreign, is decided according to the law of England (*o*): but it has been decided that the question of divorce is not an incident of the marriage contract to be governed by the *lex loci contractûs*. The power of dissolving the marriage tie is an incident of status to be regulated by the law of the domicil of the parties—that is, of the husband, for immediately upon marriage the wife's domicil becomes that of her husband. Although mere residence in a country may be sufficient to justify the Courts of that country in ordering aliment, or decreeing judicial separation, the only true test of jurisdiction to decree a divorce, according to international law, is the domicil for the time being of the married pair. There is no such thing as a matrimonial domicil (*p*). Thus (*q*)

192; but see Viditz *v.* O'Hagan, [1900] 2 Ch. 87; 69 L. J. Ch. 507; distinguished in *In re* Bankes, [1902] 2 Ch. 333; 71 L. J. Ch. 708.

(*m*) *In re* Bethell, Bethell *v.* Hildyard (1888), 38 Ch. D. 220; 57 L. J. Ch. 487, a case where an Englishman went through the ceremony of marriage with a woman of the Baralong tribe in Bechuanaland according to the customs of the tribe, among whom polygamy is allowed; and see De Wilton *v.* Montefiore, [1900] 2 Ch. 481; 69 L. J. Ch. 717; and *In re* Bozzelli, [1902] 1 Ch. 751; 71 L. J. Ch. 505, where it was held that a marriage with a deceased husband's brother, if valid according to the law of the country where it was celebrated and in which the parties were then domiciled, is valid in this country, although the wife was a domiciled Englishwoman at the date of her first marriage, and merely acquired a foreign domicil by reason of that marriage.

(*n*) De Nicols *v.* Curlier (No. 1), [1900] A. C. 21; 69 L. J. Ch. 109; and see De Nicols *v.* Curlier (No. 2), [1900] 2 Ch. 410; 69 L. J. Ch. 680.

(*o*) Sottomayer *v.* De Barros (1879), 5 P. D. 94; 49 L. J. P. 1; *In re* Cooke's Trusts (1887), 56 L. J. Ch. 637; 56 L. T. 737.

(*p*) Le Mesurier *v.* Le Mesurier, [1895] A. C. 517; 64 L. J. P. C. 97; approving the judgment of Lord Penzance in Wilson *v.* Wilson (1872), L. R. 2 P. 435; 41 L. J. P. 74.

(*q*) Harvey *v.* Farnie (1882), 8 App. Cas. 43; 52 L. J. P. 33;

an English Court will recognize as valid the decree of a Scotch Court dissolving the marriage of a domiciled Scotchman and an Englishwoman, although the marriage was solemnized in England, and was dissolved upon a ground for which by English law no divorce could have been granted.

Bankruptcy.

A party to a contract made and to be performed in England is not discharged from liability under such contract by a discharge in bankruptcy or liquidation under the law of a foreign country in which he is domiciled (*r*).

Torts committed abroad.

As to torts committed abroad, an action lies in England, provided that the tort is actionable by our law and is not innocent according to the law of the country where the act was committed; but it is not necessary that it should be the subject of civil proceedings in that country. The case of Phillips *v.* Eyre (*s*) is a leading authority on this subject. It was an action for assault and false imprisonment against the ex-governor of Jamaica, the trespass complained of having been committed during a rebellion in that island. The defendant successfully relied on an Act of Indemnity which the Jamaica Legislature had passed, and said that legislation, though *ex post facto*, cured the wrongfulness of his acts, and prevented the plaintiff from recovering. The case of The Halley (*t*) is another authority on the subject. By the negligence of a pilot, compulsorily taken on board, The Halley, a British steamer in Belgian waters, ran down a Norwegian vessel, The Napoleon. By Belgian law the Britisher was liable, but by our law the fact that the pilot was on board, and that the collision was due to his negligence, exempted her. It was held that, under those circumstances, no action lay against her in England. "It is," the Court said, "in their lordships' opinion, alike contrary to principle and to authority to hold that an English Court of justice will enforce a foreign municipal law, and will give a remedy in the shape of damages, in respect of an act which, according to its own principles, imposes no liability on the person from whom the damages are claimed."

Waste.

But waste committed by a tenant in tail is not regarded as a tort, but as a breach of an obligation in the nature of an implied contract (*u*).

and see Green *v.* Green, [1893] P. 89; 62 L. J. P. 112.

(*r*) Gibbs *v.* Société des Métaux (1890), 25 Q. B. D. 399; 59 L. J. Q. B. 510.

(*s*) (1870), L. R. 6 Q. B. 1; 40 L. J. Q. B. 28; and see the recent case of Machado *v.* Fontes, [1898] 2 Q. B. 231; 66 L. J. Q. B. 542.

(*t*) (1868), L. R. 2 P. C. 193; 37 L. J. Adm. 33. See also the M. Moxham (1875), 1 P. D. 43, 107; 46 L. J. A. 17; and Carr *v.* Fracis, [1902] A. C. 176; 71 L. J. K. B. 361.

(*u*) Batthyany *v.* Walford (1887), 36 Ch. D. 269; 56 L. J. Ch. 881.

Procedure.

But, on the other hand, it is no defence to an action for a tort committed in a foreign country that by the laws of that country no action lies till the defendant has been dealt with criminally, for that is a mere matter of procedure (*x*).

Foreign law, how proved.

The Courts do not take judicial notice of the laws of foreign states. Such laws are proved by the oral evidence of persons having a practical acquaintance with them, and whether any particular person tendered as a witness is duly competent is a question for the Court. In a case (*y*) in which the question was whether a London hotel-keeper, but a native of Belgium, and who had been a merchant in Brussels, was competent to prove the law of Belgium as to the presentment of promissory notes, Talfourd, J., said: "Foreign law is matter of fact: any person who can satisfy the Court that he has the means of knowing it is an admissible witness to prove it. One who has been long in the habit of attending as a special juryman in the City of London would no doubt be well qualified to speak as to the law of England on many subjects connected with commerce. As to the *admissibility* of this person's evidence, I think there can be no doubt, whatever may have been the *weight* it was entitled to." If witnesses called to prove foreign law refer to any passages in the code of their country, as containing the law applicable to the case, the Court is at liberty to look at those passages and consider what is their proper meaning (*z*).

Proceeding *in personam*.

The judgment of a foreign Court in any proceeding *in personam*, if final and conclusive where made, and if not plainly contrary to natural justice, is final and conclusive here (*a*).

Fraud.

Where, however, an action is brought to enforce a foreign judgment, the defendant may raise the defence that such judgment was obtained by the fraud of the plaintiff, even although the fraud alleged is such that it cannot be proved without re-trying the questions adjudicated upon by the foreign Court (*b*).

Law of the flag.

The owner of cargo who ships it on board a foreign vessel ships it to be dealt with by the master according to the law of the flag, that is, the law of the country to which the vessel belongs, unless the

(*x*) Scott *v.* Seymour (1862), 1 H. & C. 219; 32 L. J. Ex. 61.

(*y*) Vander Donckt *v.* Thellusson (1849), 8 C. B. 812; 19 L. J. C. P. 12; see also Hawksford *v.* Giffard (1886), 12 App. Cas. 122; 56 L. J. P. C. 10.

(*z*) Concha *v.* Murrieta (1889), 40 Ch. D. 543; 60 L. T. 798.

(*a*) Richardo *v.* Garcias (1845), 12 Cl. & Fin. 368; Grant *v.* Easton (1883), 13 Q. B. D. 302; 53 L. J. Q. B. 68; Nouvion *v.* Freeman (1889), 15 App. Cas. 1; 59 L. J. Ch. 337.

(*b*) Vadala *v.* Lawes (1890), 25 Q. B. D. 310; 63 L. T. 128; Abouloff *v.* Oppenheimer (1883), 10 Q. B. D. 295; 52 L. J. Q. B. 6.

circumstances under which the contract was entered into show that the parties intended it to be governed by the law of some other country (*c*).

Land situate abroad.

The Court will not determine a contested claim to land situate in a foreign country strictly so called, being no part of the British dominions, simply because the plaintiff and defendant are in this country (*d*).

A will of land must be executed in accordance with the formalities required by the *lex loci*. Leasehold property in England, or an equitable interest therein, is "land" for the purposes of this rule (*e*).

Unsealed lease.

By Scotch law an instrument under seal is not necessary for the conveyance of a sporting right, and therefore the stipulations of an unsealed lease made between Englishmen in England of a sporting right over land in Scotland may be enforced by action in the English Courts, as the provision of the law of England that an instrument under seal is necessary for the conveyance of a right to an incorporeal hereditament is not part of the *lex fori* (*f*).

Negligence.

In an action *in personam*, brought by the owners of a British vessel against the owners of a Spanish vessel to recover damages caused to the British vessel by collision with the Spanish vessel on the high seas, the defendants pleaded that they were Spanish subjects, and that if there was any negligence on the part of those in charge of the Spanish vessel, it was negligence for which the master and crew alone, and not the defendants, were liable according to the law of Spain. It was decided that such a defence was bad upon demurrer (*g*).

Colonial law.

In Bateman *v.* Service it was held that the Western Australian Joint Stock Companies Ordinance Act, 1858, does not apply to foreign corporations or to companies incorporated out of Western Australia, and properly and lawfully carrying on business as such. Consequently, a limited company incorporated elsewhere, not having complied with its provisions, can nevertheless carry on business and make contracts in Western Australia by its agent

(*c*) The Gaetano and Maria (1882), 7 P. D. 1, 137; 51 L. J. P. 67; Chartered Mercantile Bank of India *v.* Netherlands India Steam Navigation Co. (1883), 10 Q. B. D. 521; 52 L. J. Q. B. 220; *In re* Missouri Steamship Co. (1889), 42 Ch. D. 321; 58 L. J. Ch. 721; The August, [1891] P. 328; 60 L. J. P. 57; The Industrie, [1894] P. 58; 63 L. J. P. 84.

(*d*) *In re* Hawthorne, Graham *v.* Massey (1883), 23 Ch. D. 743; 52 L. J. Ch. 750.

(*e*) See Pepin *v.* Bruyère, [1902] 1 Ch. 24; 71 L. J. Ch. 39.

(*f*) Adams *v.* Clutterbuck (1883), 10 Q. B. D. 403; 52 L. J. Q. B. 607.

(*g*) The Leon (1881), 6 P. D. 148; 50 L. J. P. 59.

without its members being liable individually for its debts and engagements, and that a company duly registered and incorporated in Victoria, could not be again registered as a company in Western Australia (*h*).

Proof of Persian law.

D. M. K., a Persian subject, was by a decree of a Persian Court declared entitled to certain property in this country. The decree, though founded partly upon a will, made no mention of it, and the Court which had custody of the will refused to give a copy of it. The Court of Probate granted letters of administration limited to the property mentioned in a duly authenticated copy of the decree. The Court allowed the law applicable to the case to be proved by a Persian ambassador (*i*).

Legitimacy.

A bequest of personalty in an English will to the children of a foreigner must be construed to mean to his legitimate children, and by international law as recognised in this country, those children are legitimate whose legitimacy is established by the law of their father's domicil (*k*).

Domicil.

The domicil of a person is that place or country in which his habitation is fixed without any present intention of removing therefrom (*l*). The original domicil of a legitimate child is that of its father at the time of its birth, but an illegitimate child takes the domicil of its mother (*m*), and throughout infancy the child's domicil generally, but not necessarily (*n*), follows that of its parent through any changes that may occur. The domicil of a child who has never been of sound mind since attaining majority continues to follow the changes of its father's domicil; the incapacity of lunacy is in this case a mere prolongation of the incapacity of minority. The domicil of a wife is that of her husband. A person may change his domicil by establishing in a new country a permanent residence; the actual duration of the residence is only important as evidence of intention, which must be *quatenus in illo exuere patriam* (*o*). It should be observed that domicil is established by conduct, and not by assertion (*p*). A change of domicil must be a residence *sine*

(*h*) Bateman *v.* Service (1881), 6 App. Cas. 386; Bulkeley *v.* Schutz (1871), L. R. 3 P. C. 764; 8 Moore, P. C. C. N. S. 170.

(*i*) In the Goods of Dost Aly Khan (1880), 6 P. D. 6; 49 L. J. P. 78.

(*k*) *In re* Andros, Andros *v.* Andros (1883), 24 Ch. D. 637; 52 L. J. Ch. 793; and see *In re* Grey, Grey *v.* Stamford, [1892] 3 Ch. 88; 61 L. J. Ch. 622.

(*l*) Craignish *v.* Hewitt, [1892] 3 Ch. 180; 67 L. T. 689; and see *In re* Martin, Loustalan *v.* Loustalan, [1900] P. 211; 69 L. J. P. 75.

(*m*) Urquhart *v.* Butterfield (1887), 37 Ch. D. 357; 57 L. J. Ch. 521.

(*n*) See *In re* Beaumont, [1893] 3 Ch. 490; 62 L. J. Ch. 923.

(*o*) Per Lord Cranworth in Moorhouse *v.* Lord (1863), 10 H. L. Cas. 272.

(*p*) McMullen *v.* Wadsworth

animo revertendi. A temporary residence for the purposes of health, travel, or business does not change the domicil. Every presumption is to be made in favour of the original domicil, and no change can occur without an actual residence in a new country, and a clear intention of abandoning the old (*q*). The following cases on domicil may be referred to:—Abd-ul-Messih *v.* Farra (1888), 13 App. Cas. 431; 57 L. J. P. C. 88; *In re* Tootall's Trusts (1882), 23 Ch. D. 532; 52 L. J. Ch. 664; Bloxam *v.* Favre (1884), 9 P. D. 130; 53 L. J. P. 26; *Ex parte* Cunningham (1884), 13 Q. B. D. 418; 53 L. J. Ch. 1067; Bradford *v.* Young (1885), 29 Ch. D. 617; 53 L. T. 407; *In re* Patience (1885), 29 Ch. D. 976; 54 L. J. Ch. 897; *In re* Macreight (1885), 30 Ch. D. 165; 55 L. J. Ch. 28; *In re* Marrett, Chalmers *v.* Wingfield (1887), 36 Ch. D. 400; 57 L. T. 896; *In re* Grove, Vaucher *v.* Solicitor to the Treasury (1888), 40 Ch. D. 216; 58 L. J. Ch. 57; Turner *v.* Thompson (1888), 13 P. D. 37; 57 L. J. P. 40; D'Etchegoyen *v.* D'Etchegoyen (1888), 13 P. D. 132; 57 L. J. P. 101; *In re* Hernando, Hernando *v.* Sawtell (1884), 27 Ch. D. 284; 53 L. J. Ch. 865; Hurley *v.* Hurley (1892), 67 L. T. 384; Goulder *v.* Goulder, [1892] P. 240; 61 L. J. P. 117.

Corporations.

A corporation constituted according to the laws of a foreign state is a subject of that state, and an alien, even though most or all of its members are British subjects (*r*).

Appearance without protest.

A testator, who was domiciled and resident in Scotland, and whose will was in Scotch form, appointed six executors, two of whom were resident in England; another, being a Scotch member of Parliament, resided in England during the session; and the other three resided in Scotland. The value of the estate was about £500,000, and it was all in Scotland with the exception of about £25,000, which was in England. The executors proved the will in Scotland, and constituted themselves legal personal representatives in England, and removed all the English personalty to Scotland. An action was then commenced in England by a plaintiff resident there, who was entitled to a share of a legacy, and also of the residue, for the administration of the estate. Three of the trustees were served in England, and the other three in Scotland, and they entered an appearance without any protest, and took no steps to discharge the order. No action was pending in Scotland for the administration of the estate there. It was decided that the Court

(1889), 14 App. Cas. 631; 59 L. J. P. C. 7.

(*q*) Lauderdale Peerage case (1885), 10 App. Cas. 692. For a full discussion of the law of domicil, see Westlake on Private International Law, p. 284 (3rd ed.), and Dicey on the Law of Domicil.

(*r*) Janson *v.* Driefontein Consolidated Mines, [1902] A. C. 484; 71 L. J. K. B. 857.

at the trial has no discretion, and that the plaintiff was entitled to the ordinary decree for the administration of the whole estate. But if the executors had appeared conditionally, and applied to discharge the order for service in Scotland, the Court would have considered the question as to whether it was convenient to have the estate administered in England (*s*).

Foreign personal assets.

Foreign personal assets are governed by the *lex domicilii* of the deceased owner for the purpose of succession and enjoyment. For the purpose of legal representation, of collection, and of administration as distinguished from distribution among the successors, they are governed by the *lex loci* (*t*). In the case of Duncan *v.* Lawson (*u*), it was held that leaseholds in England, belonging to a domiciled Scotchman, devolve, in case of his intestacy, upon the persons entitled according to the English Statute of Distributions.

Crime.

All crime is local. The jurisdiction over crime belongs to the country where the crime is committed, and except over his own subjects, his Majesty and the Imperial Legislature have no power whatever (*x*).

Other cases.

The following cases may also be referred to:—Greer *v.* Poole (1880), 5 Q. B. D. 272, how far foreign law is applicable to an English policy of marine insurance effected upon goods shipped in a foreign ship; *In re* Marseilles, &c. Railway Co. (1885), 30 Ch. D. 598; 55 L. J. Ch. 116, bills of exchange were drawn in France by a domiciled Frenchman, in the French language, in English form, on an English company, who duly accepted them. The drawer having indorsed the bills, and sent them to an Englishman in England, it was held that the acceptor could not dispute the negotiability of the bills by reason of the indorsements being invalid according to French law; *In re* Matheson (1884), 27 Ch. D. 225; 51 L. T. 111, jurisdiction to wind up a foreign company with branch office, assets, and liabilities in England; *In re* Kloebe, Kannreuther *v.* Geiselbrecht (1884), 28 Ch. D. 175; 54 L. J. Ch. 297, in the administration of the English estate of a deceased domiciled abroad, foreign creditors are entitled to dividends "*pari passu*" with English creditors.

(*s*) *In re* Orr-Ewing, Orr-Ewing *v.* Orr-Ewing (1883), 9 App. Cas. 34; 53 L. J. Ch. 435; and see 10 App. Cas. 453; 53 L. T. 826.

(*t*) Blackwood *v.* Reg. (1882), 8 App. Cas. 82; 52 L. J. P. C. 10. See *In re* Trufort, Trafford *v.* Blanc (1887), 36 Ch. D. 600; 57 L. J. Ch. 135.

(*u*) (1889), 41 Ch. D. 394; 58 L. J. Ch. 502.

(*x*) See Macleod *v.* Att.-Gen., [1891] A. C. 455; 60 L. J. P. C. 55; and Huntington *v.* Attrill, [1893] A. C. 150; 62 L. J. P. C. 14.

Presumption of Death after Seven Years' Absence.

[147] **NEPEAN** *v.* **DOE.** (1837)

[2 M. & W. 894; 5 B. & Ad. 86.]

The effect of this case is that when a person goes abroad and is not heard of for seven years the law presumes him to be dead, unless the circumstances of the case are such as to account for his not being heard of without assuming his death, but does not presume that he died at any particular period during those seven years.

Case of several perishing by same calamity.

Distressing cases, leading to litigation, occasionally arise where whole families have perished by the same calamity. One well-known case on the subject is Wing *v.* Angrave (*y*), where a husband, wife, and children were all washed away by the same wave.

Roman law.

In the Roman law, if a father and son died under such circumstances it was presumed that the son died first if he was under the age of puberty, but if he was over that age that the father died first; the principle being that the father would probably be the stronger of the two in the former case, and the son in the latter.

No presumption in English law.

We have no presumptions of this kind, and when a similar case arises we call on a claimant, by survivorship, to give affirmative proof of what he asserts. An illustration of this is to be found in the case of *Re* Johnson (*z*). Two brothers sailed in the same vessel in 1896, but nothing had been heard of them, or any one else on board, from that time; and the Court ruled that there was no reason to suppose that either died before the other. In Elliott *v.* Smith (*a*), a testator left legacies to three persons, and if any of them died in the testator's lifetime, his share was to go to the others. One of the legatees and the testator died at the same instant. It was held that the legacy of the legatee so dying became part of the residue.

When an application is made to presume the death of an individual who has disappeared, the Court, on being satisfied that

(*u*) (1860), 8 H. L. C. 183; 30 L. J. Ch. 65; and see *In re* Alston, [1892] P. 142; 61 L. J. P. 92.

(*z*) (1898), 78 L. T. 85.

(*a*) (1882), 22 Ch. D. 236; 52 L. J. Ch. 222.

every reasonable means has been exhausted by advertisement and otherwise (without success) to ascertain his whereabouts, and on the evidence generally that there is every reason to believe that he is dead, will proceed to presume his death, without regard to the length of time that may have elapsed since his disappearance, though the lapse of time is often an important element in the inquiry (*b*). But the Court will not presume the death of a person until it is satisfied that it has before it the best evidence that can reasonably be obtained on the subject (*c*).

Meaning of "not being heard of."

The meaning of "not being heard of for seven years" was much discussed in the case of the Prudential Assurance Company *v.* Edmonds (*d*); and although there was considerable difference of opinion on the special circumstances of that case, it may be taken as clear that there is no absolute and positive rule of law that a mere physical hearing would put an end to the presumption of death. "Not being heard of" means this: that enquiry has been made, and that no member of the family has heard anything about the missing man which might raise a reasonable doubt in their minds whether he must have been no more. This, however, is not a complete and comprehensive explanation, because, even if a statement creating a reasonable doubt has been made to the family, and the foundation of such statement is subsequently disproved, then of course it will go for nothing, and the presumption of death will, in the absence of further evidence, arise.

Case of Prudential Assurance Co. *v.* Edmonds.

Thus, in the case last mentioned, a member of the family stated that on one occasion during the seven years she saw a man whom she believed to be the missing one, but before she could speak to him he was lost in the passing crowd. This circumstance she at once communicated to her relatives; but it was held that the presumption of death would not thereby be rebutted, unless the jury found as a fact that she was not mistaken in her identification.

A person will not be presumed to be dead from the fact of his not having been heard of for seven years, if the other circumstances of the case render it probable that he would not be heard of though alive (*e*).

No presumption as to time of death.

The question at what time within the period of seven years the lost man died is not a matter of presumption, but of evidence, and

(*b*) See *In re* Matthews, [1898] P. 17; 67 L. J. P. 11, where leave was given to presume the death of an individual who had disappeared just under three years. See also *In re* Winstone, [1898] P. 143; 67 L. J. P. 76.

(*c*) *In re* Clarke, [1896] P. 287; 66 L. J. P. 9.

(*d*) (1877), 2 App. Cas. 487.

(*e*) Watson *v.* England (1844), 14 Sim. 28; 8 Jur. 1062; Bowden *v.* Henderson (1854), 2 Sm. & G. 360.

the onus of proving that the death took place at any particular time lies upon the person who claims a right to the establishment of which that fact is essential (*f*). Thus, in a well-known case (*g*), a testator died in January, 1861, having bequeathed his residuary estate equally between his nephews and nieces. One of the nephews had gone to America many years before, and was last heard of as alive in June, 1860. In the year 1869 his personal representative sought to establish his title to the share of the missing one; but the attempt was unsuccessful, for although there was a presumption that the last man was dead at the time of the application in 1869, there was no presumption that he was alive at the time of the testator's death, and therefore no evidence that he was ever entitled to any share at all. There is no presumption of law in favour of the continuance of life, though an inference of fact may clearly be legitimately drawn that a person alive and in health on a certain day was alive a short time afterwards. Thus, in *Re* Tindall (*h*), a young sailor was last seen in the summer of 1840 going to Portsmouth to embark. His grandmother died in March, 1841, and the Court presumed that he was the survivor.

In re Phenè's Trusts.

In re Corbishley's Trusts.

It is important to observe that where the missing person does not take a share under a will, as *In re* Phenè's Trusts, but under a settlement containing a trust in his favour, a different rule would appear to apply. In the case of a settlement containing a trust for a person named, such person must, at any rate according to Hall, V.-C. (*i*), "until the contrary is shown, be taken to have been in existence at the date of that settlement. The trust, then, being so created, the representative of that person (he being dead) is entitled to the benefit of that trust until those who say that the trust failed altogether prove such failure by affirmative evidence."

Conflicting presumptions

A somewhat curious case (*k*) of conflicting presumptions recently came before the Court of Crown Cases Reserved. A marriage

(*f*) See *In re* Benjamin, [1902] 1 Ch. 723; 71 L. J. Ch. 319; applying *In re* Walker (1871), L. R. 7 Ch. 120; 41 L. J. Ch. 219.

(*g*) *In re* Phenè's Trusts (1870), L. R. 5 Ch. 139; 39 L. J. Ch. 316. See also *In re* Rhodes, Rhodes *v.* Rhodes (1887), 36 Ch. D. 586; 56 L. J. Ch. 825; Thomas *v.* Thomas (1864), 2 Drew. & Sm. 298; 11 L. T. 47; Lambe *v.* Orton (1859), 29 L. J. Ch. 286; 6 Jur. N. S. 61; *In re* Lawes (1871), L. R. 6 Ch. 356; 40 L. J. Ch. 602.

(*h*) (1861), 30 Beav. 151; and see Pennefather *v.* Pennefather (1872), 6 Ir. R. Eq. 171.

(*i*) *In re* Corbishley's Trusts (1880), 14 Ch. D. 846; 49 L. J. Ch. 266.

(*k*) Reg. *v.* Willshire (1881), 6 Q. B. D. 366; 14 Cox, C. C. 541; and see Reg. *v.* Briggs (1856), 7 Cox, C. C. 175; 26 L. J. M. C. 7; Reg. *v.* Curgerwen (1865), L. R. 1 C. C. 1; 10 Cox, C. C. 152; Reg. *v.* Lumley (1869), L. R. 1 C. C. 196; 11 Cox, C. C. 274.

admitted to be valid, was contracted by the prisoner in 1864; there was evidence that the woman then married to the prisoner was alive in 1868. In 1879 the prisoner went through the ceremony of marriage with another woman, and again, in 1880, with a third, and was thereupon indicted for bigamy. The wife alleged in the indictment to be alive at the time of the commission of the offence was the one with whom the prisoner had gone through a form of marriage in 1879. It was held that on these facts the prisoner ought not to have been convicted, as the jury had not found affirmatively that the wife married in 1864 was dead at the time of the celebration of the marriage in 1879. It is true that, if nothing was heard of the first woman after 1868, the prisoner could not have been convicted of bigamy in respect of the marriage of 1879; but, so far as the charge under the consideration of the Court was concerned, it was held that "there was a presumption that her life continued. The only evidence to the contrary was that the prisoner presented himself as a bachelor to be married in 1879. Whether that would have satisfied the jury that his former wife was then dead was a question for them to decide, but it was not left to them for decision" (*l*). In bigamy cases.

A *bonâ fide* belief on reasonable grounds in the death of her husband by a woman who had gone through the ceremony of marriage within seven years after she had been deserted by her husband, forms a good defence to an indictment for bigamy (*m*).

Money was payable to a tenant *pur autre vie* under a policy, after proof, to the satisfaction of directors, of the *cestui que vie*. An order was made under 6 Anne, c. 72, that the *cestui que vie* ought to be deemed and taken to be dead under the statute, and the remainder-men entered. The Court held that the directors might reasonably require further evidence of the death of the *cestui que vie* (*n*). Evidence of death.

(*l*) Per Hawkins, J.

(*m*) So decided by a majority of nine judges against five in the Court of Crown Cases Reserved in Reg. *v.* Tolson (1889), 23 Q. B. D. 168; 16 Cox, C. C. 629. There had been previously a conflict of authorities, Reg. *v.* Turner, 9 Cox, C. C. 145; Reg. *v.* Horton, 11 Cox, C. C. 670; Reg. *v.* Moore, 13 Cox, C. C. 544, being in the prisoner's favour; Reg. *v.* Gibbons, 12 Cox, C. C. 237; Reg. *v.* Bennett, 14 Cox, C. C. 45, being to the contrary effect.

(*n*) Doyle *v.* City of Glasgow Life Assurance Co. (1884), 53 L. J. Ch. 527; 50 L. T. 323; but see Willyams *v.* Scottish Widows' Fund (1888), 52 J. P. 471.

Estoppel.

[148] DUCHESS OF KINGSTON'S CASE. (1776)

[20 How. St. Tr.; 1 Leach, C. C. 146.]

This was a prosecution for bigamy, and the judges were required to answer the following questions:—

(1.) If a spiritual Court decides that a marriage is null and void, is its decision so conclusive on the subject that the marriage cannot be proved against one of the parties in an indictment for bigamy?

(2.) Supposing the spiritual Court's decision *is* final, may counsel for the prosecution destroy its effect by showing that it was brought about by fraud and collusion?

The first question was answered in the negative, so that it did not much matter what the answer to the second was. That question, however, the judges answered in the affirmative.

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[149] BOWMAN *v.* TAYLOR. (1834)

[2 A. & E. 278; 4 L. J. K. B. 58.]

In this case, a deed recited that the plaintiff had invented certain improvements for which he had obtained a patent; and the defendant, in consideration of a licence to use it, entered into certain covenants, for the breach of which he was sued; and the Court held that he could not traverse the invention of the plaintiff, and that a plea to that effect was bad upon demurrer. "The law of estoppel," said Taunton, J., "is not so unjust or absurd

as it has been too much the custom to represent. The principle is, that where a man has entered into a solemn engagement by deed under his hand and seal as to certain facts, he shall not be permitted to deny any matter which he has so asserted. The question here is, whether there is a matter so asserted by the defendant under his hand and seal that he shall not be permitted to deny it in pleading. It is said that the allegation in the deed is made by way of recital, but I do not see that a statement such as this is the less positive because it is introduced by a 'whereas.'"

PICKARD *v.* SEARS. (1837) [150]

[6 A. & E. 469; 2 N. & P. 488.]

This was an action of trover for machinery and other articles, brought by a mortgagee of one Metcalfe, the former owner, against a purchaser from the sheriff, under an execution levied against that former owner. The property had been assigned to the plaintiff some months before the execution, and was in fact his. The mortgagor had, however, remained in possession, carrying on his trade, till the execution issued. After the sheriff had entered, and even after the plaintiff knew that a sale was in contemplation, he had come to the premises, and given no notice of his claim or of his mortgage, although the proposed sale had been discussed between him and the execution creditor's attorney. The defendant had purchased *bonâ fide*, and in total ignorance that the plaintiff had any interest in the property. Under these circumstances, it was held that the plaintiff was estopped from denying the defendant's title. "The rule of law is clear," said Lord Denman, C. J., "that, where one by his words

or conduct wilfully causes another to believe the existence of a certain state of things, and induces him to act on that belief, so as to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time."

Various kinds of estoppel.

Estoppels (which Lord Coke considered "a curious and excellent sort of learning") are of three kinds:—

1. By matter of record.
2. By deed.
3. By conduct (otherwise known as *in pais*).

Estoppel by record.

1. Generally, when the parties are the same, and the point litigated the same, a former judgment recorded is conclusive. Thus, if a record in a former action is tendered in evidence, the other side cannot be permitted to show that the officer of the Court made a mistake and entered the verdict on the wrong plea (*o*). So, too, if in an action of trespass by A. against B., an issue is taken on the plea that the land belongs to B., and final judgment is entered on this issue in favour of A., B. cannot, in a subsequent action against the same defendant for trespass by digging up coals in the same land, plead that the land is his and not A.'s (*p*). But if a plaintiff sues in a different right in the second action from what he did in the first (*e.g.*, if the administratrix of a person who has been killed by the negligence of a railway company sues first under Lord Campbell's Act, and then, in another action, for damage to the personal estate) there is no estoppel (*q*).

In order to establish the plea of *res judicata*, the judgment relied on must have been pronounced by a Court having concurrent or exclusive jurisdiction directly upon the matter in question (*r*).

Judgment by consent.

A judgment *by consent* operates as an estoppel *inter partes* as much as if the case had been fought out. It makes no difference

(*o*) Reed *v.* Jackson (1801), 1 East, 355; 6 R. R. 283; and see Peareth *v.* Marriott (1882), 22 Ch. D. 182; 52 L. J. Ch. 221; *In re* Defries, Norton *v.* Levy (1883), 48 L. T. 703; 31 W. R. 720; *In re* May (1885), 28 Ch. D. 516; 54 L. J. Ch. 338; Caird *v.* Moss (1886), 33 Ch. D. 22; 55 L. J. Ch. 854, an action for rectification of an agreement already construed by the Court; Macdougall *v.* Knight (1890), 25 Q. B. D. 1; 59 L. J. Q. B. 517.

(*p*) Outram *v.* Morewood (1803), 3 East, 346; 7 R. R. 473; and see Butler *v.* Butler, [1894] P. 25; 63 L. J. P. 1.

(*q*) Leggott *v.* G. N. Ry. Co. (1876), 1 Q. B. D. 599; 45 L. J. Q. B. 557; Daly *v.* Dublin, Wicklow & Wexford Ry. (1892), 30 L. R. Ir. 514.

(*r*) See Att.-Gen. for Trinidad *v.* Eriché, [1893] A. C. 518; 63 L. J. P. C. 6.

that the Court has not exercised its mind on the matters in controversy (*s*).

Joint contractors.

As to when an unsatisfied judgment against one joint contractor is a bar to an action against the other joint contractor, the following cases should be consulted:—King *v.* Hoare (1844), 13 M. & W. 494; Kendall *v.* Hamilton (1879), 4 App. Cas. 504; 48 L. J. C. P. 705; Wegg-Prosser *v.* Evans, [1895] 1 Q. B. 108; 64 L. J. Q. B. 1, overruling Cambefort *v.* Chapman (1887), 19 Q. B. D. 229; 56 L. J. Q. B. 639; *In re* Hodgson, Beckett *v.* Ramsdale (1885), 31 Ch. D. 177; 55 L. J. Ch. 241; Weall *v.* James (1893), 68 L. T. 515; 4 R. 356; McLeod *v.* Power, [1898] 2 Ch. 295; 67 L. J. Ch. 551. In Hoare *v.* Niblett, [1891] 1 Q. B. 781; 60 L. J. Q. B. 565, the rule was held applicable to a case where one of the joint contractors was a married woman contracting in respect of her separate property.

Judgment not conclusive as to strangers, as to grounds on which it is based.

It is to be observed that in an estoppel by record, not only the parties to the action themselves, but their privies also (*i.e.*, those who claim under them), are estopped. But, although a judgment is conclusive proof as against everybody of the existence of that state of things which is the legal effort of the judgment, yet, on the principle *res inter alios acta alteri nocere non potest*, it is not, so far as strangers are concerned, conclusive proof of the facts stated to be the grounds on which it is based. How far a judgment is conclusive as between parties and privies of facts forming the ground of the judgment may, perhaps, be a question admitting of some doubt. Mr. Justice Stephen, in his Digest of the Law of Evidence, says (*t*):—"Every judgment is conclusive proof as against parties and privies of facts directly in issue in the case, actually decided by the Court, and appearing from the judgment itself to be the ground on which it was based; unless evidence was admitted in the action in which the judgment was delivered which is excluded in the action, in which that judgment is intended to be proved." Vice-Chancellor Knight-Bruce, however, expressed his opinion on the subject thus (*u*):—"It is, I think, to be collected that the rule, against re-agitating matter adjudicated, is subject generally to this restriction—that, however essential the establishment of particular facts may be to the soundness of judicial decision, however it may

How far this applies to parties and privies.

Statement of law by Stephen, J.

V.-C. Knight-Bruce's opinion.

(*s*) *In re* South American and Mexican Co., *Ex parte* Bank of England, [1895] 1 Ch. 37; 64 L. J. Ch. 189; Ribble Joint Committee *v.* Croston District Council, [1897] 1 Q. B. 251; 66 L. J. Q. B. 384; but see Magnus *v.* National Bank of Scotland (1888), 57 L. J. Ch. 902; 58 L. T. 617; Norman *v.* Norman (1889), 43 Ch. D. 296; 61 L. T. 637.

(*t*) P. 51 (5th ed.).

(*u*) 2 Sm. L. C. p. 746 *et seq.* (11th ed.).

proceed on them as established, and however binding and conclusive the decision may be as to its immediate and direct object, those facts are not all necessarily established conclusively between the parties, and that either may again litigate them for any other purpose as to which they may come in question; provided the immediate subject of the decision be not attempted to be withdrawn from its operation so as to defeat its direct object." These remarks were quoted with approval by Selborne, L. C., in a case (*x*) in which the facts were these: An application to justices by a local board to recover a proportion of sewering expenses from the owner of premises abutting on the street in which the sewer had been laid, was dismissed by the justices on the ground that the street was a highway repairable by the inhabitants at large. Some years afterwards the local board made a similar application against the same person in respect of the same premises. The Court of Appeal (reversing the decision of the Queen's Bench Division) held that, under these circumstances, the adjudication on the first application did not estop the local board from claiming the expenses they claimed on the second application. The ground of this decision would seem to be that the justices exceeded their jurisdiction in stating the reason on which their dismissal of the application had been based; and, if they had merely found, as they ought to have done, that the complaint of the local board was not proved, the order of dismissal could not have operated as an estoppel except against a repetition of the same demand for the same quota of expenses. And in the later case of Heath *v.* Weaverham Overseers (*y*), it was held that in determining whether a decision operates as an estoppel, the Court in a subsequent case is entitled to consider what facts were before the Court in the former case, and to give effect to any fresh facts that had subsequently taken place.

Reg. *v.* Hutchings.

Fraud, mistake, or collusion may be proved.

It is to be observed that when a judgment is put in evidence the person against whom it is offered may prove that it was obtained by any fraud or collusion to which neither he, nor anyone to whom he is a privy, was a party. Thus, it was held (*z*) that it is a good defence to an action on a foreign judgment, that such judgment was procured by the fraudulent misrepresentation of the plaintiff.

(*x*) Reg. *v.* Hutchings (1881), 6 Q. B. D. 300; 50 L. J. M. C. 35; distinguished in Wakefield Corporation *v.* Cooke, [1903] 1 K. B. 417; 72 L. J. K. B. 345; and per Chitty, J., *In re* Allsop and Joy (1889), 61 L. T. 213.

(*y*) [1894] 2 Q. B. 108; 63 L. J. M. C. 187.

(*z*) Abouloff *v.* Oppenheimer (1883), 10 Q. B. D. 295; 52 L. J. Q. B. 6; and see Vadala *v.* Lawes (1890), 25 Q. B. D. 310; 63 L. T. 128.

And it may be stated generally the Court has jurisdiction to set aside a consent order upon any ground which would invalidate an agreement between the parties, *e.g.*, common mistake (*a*).

File of bankruptcy proceedings.

The file of the proceedings in a bankruptcy is not in the nature of a record, so as to create an estoppel. Thus, the mere fact that a proof has been upon the file of the proceedings in a bankruptcy does not estop the bankrupt from applying to the Court to reduce the amount of such proof (*b*).

Estoppel by deed.

2. To execute a deed is a very solemn thing, and therefore whatever assertion a man has made in his deed he must stand by. If you execute a bond in one name, you are estopped from pleading that your name is otherwise. So, though a person who has given an *ordinary* receipt may show that he has never really received the money, a person who has given a receipt under *seal* cannot. And the *recitals* in a deed are just as binding as any other part (*c*), though a distinction has been drawn between a *general* and a *particular* recital upon the ground that an estoppel must be *certain* (*d*). And it is always a question of construction whether the recital is to be considered as the language of both parties agreeing upon a fact, or the assertion of one of them only, and the estoppel is limited in this respect by the construction of the instrument (*e*). It should also be observed that a recital in a deed does not estop the parties in an action not founded on the deed but wholly collateral thereto (*f*). In the case of General Finance Co. *v.* Liberator Society (*g*), Jessel, M. R., expressed an opinion that the doctrine of estoppel by deed "should not be carried further than a judge is obliged to carry it."

(*a*) See Huddersfield Banking Co. *v.* Lister, [1895] 2 Ch. 273; 64 L. J. Ch. 523.

(*b*) *Ex parte* Bacon, *In re* Bond (1881), 17 Ch. D. 447; 44 L. T. 834; and see Keate *v.* Phillips (1881), 18 Ch. D. 560; 50 L. J. Ch. 664.

(*c*) See Bowman *v.* Taylor, *supra*; also Lainson *v.* Tremere (1834), 1 A. & E. 792; 4 L. J. K. B. 207; Hill *v.* Manchester Waterworks Co. (1831), 2 B. & Ad. 544; 3 L. J. K. B. 19; and Horton *v.* Westminster Commissioners (1852), 7 Exch. 780; 21 L. J. Ex. 297.

(*d*) See per Lord Denman in Lainson *v.* Tremere, *supra*; per Lord Holt in Salter *v.* Kidley (1689), 1 Show. 59; and per Lord Tenterden in Right *v.* Bucknell (1831), 2 B. & Ad. 278; 9 L. J. K. B. 304. See also Kepp *v.* Wiggett (1850), 10 C. B. 35; 20 L. J. C. P. 49; Heath *v.* Crealock (1874), L. R. 10 Ch. 22; 43 L. J. Ch. 169; General Finance Co. *v.* Liberator Society (1878), 10 Ch. D. 15; 39 L. T. 600; and Onward Building Society *v.* Smithson, [1893] 1 Ch. 1; 62 L. J. Ch. 138.

(*e*) Stronghill *v.* Buck (1849), 14 Q. B. 781; 19 L. J. Q. B. 209; and Heath *v.* Crealock, *supra*.

(*f*) See Carpenter *v.* Buller (1841), 8 M. & W. 209; 10 L. J. Ex. 393; *Ex parte* Morgan (1876), 2 Ch. D. 72; 45 L. J. Bk. 36; Fraser *v.* Pendlebury (1862), 31 L. J. C. P. 1; 10 W. R. 104.

(*g*) *Supra*.

Share certificate of company.

So, too, a company which issues a share certificate stating that the person therein named is the proprietor and duly registered owner of a specified number of shares in the company is estopped from afterwards denying his title to the shares, and is liable for damages for refusing to register a transfer from him (*h*). But the liquidator of a company is not estopped by statements in a registered contract from showing that shares issued as fully paid were not paid for at all, it being *ultra vires* to issue shares as fully paid as a gift (*i*).

Two qualifications of the doctrine of estoppel by deed must be remembered:—

(1.) Although a person acknowledges in his deed that he has received the consideration money for the service he undertakes to perform, he may nevertheless show that as a matter of fact he has not received it.

(2.) A person who is sued on his *deed* may show that it is founded on fraud or illegality, and if he proves it, the document becomes worthless. The leading case on this subject is Collins *v.* Blantern, *ante*, p. 181.

No estoppel can be raised on a document which is inconsistent with the document itself (*k*).

Estoppel *in pais.*

3. Estoppels *in pais* have been classified as estoppels, (a) by *statement*, (b) by *conduct*, and (c) by *negligence;* but this is not a very logical or exact classification. The doctrine of estoppel by conduct is, perhaps, best laid down in one of the luminous judgments of Baron Parke. "The rule in Pickard *v.* Sears" (*l*), said that eminent judge in Freeman *v.* Cooke (*m*), is "that where one by his words or conduct *wilfully* causes another to believe in the existence of a certain state of facts, and induces him to act on that belief, or to alter his own previous position, the former is concluded from averring against the latter a different state of things as existing at the same time" . . . . "the proposition contained in the rule itself, as above laid down in the case of Pickard *v.* Sears, must be considered as established. By the term 'wilfully,' however, in that rule, we must understand, if not that the party represents that to be true which he knows to be untrue, at least that he means his representation to be acted upon, and that it is acted upon accord-

(*h*) Balkis Consolidated Co. *v.* Tomkinson, [1893] A. C. 396; 63 L. J. Q. B. 134; and see Bloomenthal *v.* Ford, [1897] A. C. 156; 66 L. J. Ch. 253.

(*i*) *Re* Eddystone Co., [1893] 3 Ch. 9; 62 L. J. Ch. 742.

(*k*) Colonial Bank *v.* Hepworth (1887), 36 Ch. D. 36; 56 L. J. Ch. 1089.

(*l*) *Supra.*

(*m*) (1848), 2 Ex. 654; 18 L. J. Ex. 114.

ingly; and if, whatever a man's real intentions may be, he so conducts himself that a reasonable man would take the representation to be true, and believe that it was meant that he should act upon it, and did act upon it as true, the party making the representation would be equally precluded from contesting its truth; and conduct by negligence or omission, where there is a duty cast upon a person, by usage of trade or otherwise, to disclose the truth, may often have the same effect. As, for instance, a retiring partner omitting to inform his customers of the fact, in the usual mode, that the continuing partners were no longer authorised to act as his agents, is bound by all contracts made by them with third persons, on the faith of their being so authorised."

Alderson *v.* Maddison.

In the case of Alderson *v.* Maddison, which was an action by the plaintiff, as heir-at-law of Alderson, to recover the title deeds of a farm, the defendant counterclaimed that she was entitled to a life estate in the farm. It appeared that the defendant was induced to serve Alderson (who died intestate) as his housekeeper for many years, and to give up other prospects of establishment in life, by a verbal promise that Alderson would leave her a life interest in the farm. But, as was there pointed out, to contend that Alderson's heir-at-law was estopped by Alderson's conduct from disputing the validity of an attested document, which purported to be Alderson's will, would be to repeal the Statute of Wills. Lord Selborne said: "I have always understood it to have been decided that the doctrine of estoppel by representation is applicable only to representations as to some state of facts alleged at the time actually in existence, and not to promises *de futuro*, which, if binding at all, must be binding as contracts" (*n*).

Other cases of estoppel by conduct.

But there are other cases of estoppel by conduct besides those on the principle of Pickard *v.* Sears and Freeman *v.* Cooke. A tenant, for instance, is estopped from disputing his landlord's title (*o*); though he is permitted to show that it has expired, for, in that case, he does not *dispute* the title, but confesses and avoids it by matter *ex post facto;* a bailee or agent is generally precluded from

(*n*) (1883), 8 App. Cas. 473; 52 L. J. Q. B. 737; overruling Loffus *v.* Maw (1863), 3 Giff. 592; 32 L. J. Ch. 49; and see Carr *v.* L. & N. W. Rail. Co. (1875), L. R. 10 C. P. 307; 44 L. J. C. P. 109; Scarf *v.* Jardine (1882), 7 App. Cas. 350; 51 L. J. Q. B. 612; Fell *v.* Parkin (1882), 52 L. J. Q. B. 99; 47 L. T. 350.

(*o*) See Wogan *v.* Doyle (1883), 12 L. R. Ir. 69, for a good illustration of this rule; and Fenner *v.* Blake, [1900] 1 Q. B. 426; 69 L. J. Q. B. 257. A third person not claiming possession of the land, who has brought goods on to the land by the licence of the tenant, is not estopped from disputing the lessor's title: Tadman *v.* Henman, [1893] 2 Q. B. 168; 57 J. P. 664.

questioning the title of his bailor or principal to the subject-matter of the bailment or agency (*p*); the acceptor of a bill of exchange from denying the signature of the drawer or his capacity to draw.

Harris *v.* Truman, Hanbury & Co.

A case of some importance is Harris *v.* Truman, Hanbury & Co. (*q*), where the defendants had employed one Fairman to buy barley, and to malt it for them only. Fairman, for the purpose of purchasing such barley, was empowered to draw upon a fund paid into a bank by the defendants. Fairman, having bought barley upon credit, and, at the same time, fraudulently drawn out money from the fund so supplied by the defendants, became bankrupt, and the defendants thereupon seized all the barley and malt upon his premises, the value of which was less than the moneys which he had drawn out. It was urged by the plaintiff, the trustee in his bankruptcy, that the barley dishonestly bought by Fairman was not bought for the defendants at all; but was bought with the intention of selling it again. But, as Brett, L. J., observed, "If Fairman had been plaintiff in this action it is impossible, after he had represented to the defendants by the accounts that all the barley at the malting was barley bought by him, and approved by the defendants, and to be paid for by them, and after he had drawn upon the defendants' account for the price, that he would not be estopped from saying that he had been defrauding the defendants. If that be so, the trustee in bankruptcy who is suing upon the relation between Fairman and the defendants would also be estopped from relying on the fraud of the bankrupt."

Estoppel by negligence.

The following passage from the judgment of Wilde, B., in Swan *v.* N. B. Australasian Co. (*r*), with the comment on it of Blackburn, J. (*s*), contains, it is apprehended, a full and accurate statement of the general rule now acted upon with reference to *estoppels by negligence*, and of the limitations on that rule. "The rule of decision," said Wilde, B., "which I deduced from an examination of the authorities is this: that if a man has wilfully made a false assertion calculated to lead others to act upon it, and they have done so to their prejudice, he is forbidden as against them to deny that assertion. *That if he has led others into the belief of a certain state of facts by conduct of culpable neglect calculated to have that result, and they have acted on that belief to their prejudice, he shall not be heard afterwards, as against such persons, to show that state of facts did not exist.* In short and in popular language, a man is not

(*p*) See *Ex parte* Mersey Docks and Harbour Board, [1899] 1 Q. B. 546; 68 L. J. Q. B. 540.

(*q*) (1882), 9 Q. B. D. 264; 51 L. J. Q. B. 338.

(*r*) (1862), 7 H. & N. 603.

(*s*) (1863), 2 H. & C. 175; 32 L. J. Ex. 273.

permitted to charge the consequences of his own *fault* on others, and complain of that which he has himself brought about." This passage should be qualified, Blackburn, J., thought, "by saying that the *neglect must be in the transaction itself, and be the proximate cause of the leading the party into that mistake; and also it must be the neglect of some duty that is owing to the person led into that belief*, or, what comes to the same thing, *to the general public of which the person is one*, and not merely of what would be prudent in respect to the party himself, or even of some duty owing to third persons, with whom those seeking to set up the estoppel are not privy" (*t*).

Reference should be made to a series of "recognized propositions of an estoppel *in pais*" laid down by Brett, L. J., in the case of Carr *v.* L. & N. W. Ry. Co. (*u*).

Baxendale *v.* Bennett.

On this subject Baxendale *v.* Bennett (*x*) is a case which is often referred to. A person named Holmes, becoming impecunious, asked the defendant for his acceptance to an accommodation bill. Willing to oblige, the defendant gave him his blank acceptance on a stamped paper and authorized him to fill in his name as drawer. Holmes, however, finding that after all he did not require accommodation, returned the paper to the defendant in the same state in which he had received it from him. The defendant put it into a drawer which he did not lock, and to which his clerk, laundress, &c. had access. From this drawer it was stolen, and finally, after having had a drawer's name put on to it, came into the hands of the plaintiff as endorsee for value. It was held that the defendant was not liable on this bill. Young *v.* Grote (*y*) was distinguished by Bramwell, L. J., from this case, on the ground that in the former case the defendant had voluntarily parted with the instrument, while in the latter it had been got from him by the commission of a crime.

Arnold *v.* Cheque Bank.

In a rather earlier case (*z*), it had been held that "negligence in the custody of a draft, or in its transmission by post, will not dis-

(*t*) See Sm. L. C. vol. 2, p. 850 (11th ed.).

(*u*) (1875), L. R. 10 C. P. 307; 44 L. J. C. P. 109.

(*x*) (1878), 3 Q. B. D. 525; 47 L. J. C. P. 624.

(*y*) (1827), 4 Bing. 253; 12 Moore, 484.

(*z*) Arnold *v.* Cheque Bank (1876), 1 C. P. D. 578; 45 L. J. C. P. 562; and see Garrard *v.* Lewis (1882), 10 Q. B. D. 30; 47 L. T. 408. Reference should also be made to the cases of Merchants of the Staple *v.* Bank of England (1887), 21 Q. B. D. 160; 57 L. J. Q. B. 418; Colonial Bank *v.* Cady (1890), 15 App. Cas. 267; 60 L. J. Ch. 131; and the judgment of Lord Esher in Vagliano *v.* Bank of England (1889), 23 Q. B. D. 243; 58 L. J. Q. B. 357; affirmed by the House of Lords, [1891] A. C. 107; 60 L. J. Q. B. 145; and followed in Clutton *v.* Attenborough, [1897] A. C. 90; 66 L. J. Q. B. 221.

entitle the owner of it to recover the draft or its proceeds from one who has wrongfully obtained possession of it," and that "negligence to amount to an estoppel must be in the transaction itself, and be the proximate cause of leading the third party into mistake, and also must be the neglect of some duty which is owing to such third party, or to the general public."

Scholfield *v.* Earl of Londesborough.

A very important decision on the law of estoppel by negligence was recently delivered in the case of Scholfield *v.* Earl of Londesborough (*a*). A bill of exchange for £500 was, after acceptance, fraudulently altered by the drawer into a bill for £3,500. The stamp upon the bill was sufficient to cover the larger amount, and the bill when accepted had spaces on the face of it in which the words and figures necessary for the alteration were afterwards written by the drawer. In an action by a holder for value against the acceptor to recover the full amount of the bill, it was held by Lord Esher, M. R., and Rigby, L. J. (Lopes, L. J., dissenting), that the acceptor of a bill owes no duty to the drawer, or to anyone taking the bill, other than to pay the bill on presentment, and that therefore the defendant, even if he were negligent in accepting the bill in the form in which it was presented for acceptance, was not estopped thereby from setting up the true facts, and was not liable on the bill otherwise than according to its original tenour. The Court also held that there was no evidence of negligence. "Suppose, however, there was both a duty and negligence," said Lord Esher, "the two together do not necessarily create an estoppel, because between them and the indorsement to the holder there comes in the felonious act of the drawer. That act, and not any default of the defendant, was the immediate cause of the plaintiff's loss, and so no estoppel arises against the defendant." The learned judge then referred to Young *v.* Grote (*supra*), which he called the "*fount of bad argument*," and said, "The only way in which that case can be supported is on the ground that the customer signed a blank cheque. That is not a case of estoppel at all, for the law merchant says that anyone who signs a blank cheque authorizes the person in whose hands it is to fill it up as his agent. If that is the ground of the decision it may be a right one, and that is the ground on which Parke, B., in Robarts *v.* Tucker (*b*), says it may be supported; but it cannot be so on the ground given in the case itself." He then quoted with approval the dictum of Bramwell, B., in Baxendale *v.*

Criticism by Lord Esher of Young *v.* Grote.

(*a*) [1895] 1 Q. B. 536; 64 L. J. Q. B. 293; affirmed by the House of Lords, [1896] A. C. 514; 65 L. J. Q. B. 593; and see Rimmer *v.* Webster, [1902] 2 Ch. 163; 71 L. J. Ch. 561.

(*b*) (1851), 16 Q. B. 560; 20 L. J. Q. B. 270.

Bennett (*c*), that "an estoppel never can be applied except in cases where the person against whom it is used has so conducted himself, either in what he has said or done, or failed to say or do, that he would, unless estopped, be saying something contrary to his former conduct in what he had said or done, or failed to say or do."

The following are a few of the many cases to be found in the reports on the subject of estoppel; they are, of course, in no way exhaustive, but will probably serve to sufficiently illustrate the principles by which the Courts are guided in determining cases under this branch of the law:—

McKenzie *v.* British Linen Co.

In McKenzie *v.* British Linen Co. it was laid down that a person who knows that a bank is relying upon his forged signature to a bill, cannot lie by and not divulge the fact until he sees the position of the bank is altered for the worse. But there is no principle on which his mere silence for a fortnight from the time when he first knew of the forgery, during which the position of the bank was in no way prejudiced or altered, can be held to be an admission or adoption of liability or an estoppel (*d*).

Coventry *v.* Great Eastern Railway Co.

The defendants received a consignment of wheat and issued a delivery order for it, which came into the hands of B. Upon this delivery order B. obtained advances from plaintiffs. Shortly afterwards the defendants issued a second delivery order in respect of the same consignment of wheat. The two delivery orders were different, and such as might reasonably be supposed to relate to distinct consignments of wheat. Upon this second delivery order B. obtained further advances from the plaintiffs, who were under the belief that the delivery orders related to distinct consignments of wheat. B. having afterwards become insolvent, the Court decided that the defendants were estopped by their negligence from showing that the two delivery orders related only to one consignment of wheat, and that they were liable to compensate the plaintiffs for the loss sustained by them through the advances to B. (*e*).

Estoppel of bailee.

Although in certain cases a bailee may set up the *jus tertii*, yet if he accepts the bailment with full knowledge of an adverse claim, he cannot afterwards set up the existence of such claim as against his bailor (*f*).

(*c*) *Supra*.

(*d*) (1881), 6 App. Cas. 82; 44 L. T. 431; dictum of Parke, B., in Freeman *v.* Cooke approved of. See also Seton *v.* Lafone (1887), 19 Q. B. D. 68; 56 L. J. Q. B. 415; and Ogilvie *v.* West Australian Mortgage Corporation, [1896] A. C. 257; 65 L. J. P. C. 46.

(*e*) Coventry *v.* Great Eastern Railway Co. (1883), 11 Q. B. D. 776; 52 L. J. Q. B. 694; and see Henderson *v.* Williams, [1895] 1 Q. B. 521; 64 L. J. Q. B. 308.

(*f*) *Ex parte* Davies, *In re* Sadler (1881), 19 Ch. D. 86; 45 L. T.

Transfer of share in a company.

Where a company has power to issue legally transferable securities, an irregularity in the issue cannot be set up against even the original holder if he has a right to presume *omnia rite acta*. If such securities be legally transferable, such an irregularity, *à fortiori* any equity against the original holder, cannot be asserted by the company against a *bonâ fide* transferee for value, without notice. Nor can such an equity be set up against an equitable transferee, whether the securities were transferable at law or not, if by the original conduct of the company in issuing the securities or by their subsequent dealing with the transferee he has a superior equity. If the original conduct of the company in issuing debentures was such that the public were justified in treating it as a representation that they were legally transferable, there would be an equity on the part of any person who had agreed for value to take a transfer of these debentures to restrain the company from pleading their invalidity, although that might be a defence at law to an action by the transferor (*g*). It should, however, be observed that neither the secretary nor the managing director of a limited company, even though the articles of association give him very wide powers as to the commercial business of the company, has power to act for the company in relation to a proposed transfer of shares, so as to raise an estoppel against the company (*h*).

Bastardy order.

Justices made an order in bastardy directing the putative father to pay until the mother married, and the father accordingly made payments, some of which were made within a year from the birth. Afterwards the mother married, but her husband died, and thereupon on her application justices made a second order on the putative father to pay. The Court decided that the matter was *res judicata*, and therefore the order was invalid (*i*).

Damages for negligence.

The plaintiff brought an action in the County Court for damage to his cab through the defendant's negligence, and, having recovered the amount claimed, brought an action in the Divisional Court against the defendant claiming damages for personal injury sustained by the plaintiff through the same negligence. The Court decided that inasmuch as the damages for personal injuries might have been claimed in the first action, the judgment recovered in it

632; and see Rogers *v.* Lambert, [1891] 1 Q. B. 318; 60 L. J. Q. B. 187.

(*g*) *In re* Romford Canal Co., Pocock's claim, Trickett's claim, Carew's claim (1883), 24 Ch. D. 85; 52 L. J. Ch. 729; and see Balkis Consolidated Co. *v.* Tomkinson, *ante*, p. 652.

(*h*) See Whitechurch *v.* Cavanagh, [1902] A. C. 117; 71 L. J. K. B. 400.

(*i*) Williams *v.* Davies (1883), 11 Q. B. D. 74; 52 L. J. M. C. 87. See Anderson *v.* Collinson, [1901] 2 K. B. 107; 70 L. J. K. B. 620.

was a bar to subsequent proceedings. This decision, however, was reversed in the Court of Appeal, which held the plaintiff was entitled to recover as the causes of action were distinct (*k*).

Probate issue.

In an action in the Probate Division, L. and G. propounded an earlier and P. a later will. The action was compromised, and, by consent, verdict and judgment were taken for establishing the earlier will. Subsequently P. discovered that the earlier will was a forgery, and in an action in the Chancery Division, to which L. and G. were parties, obtained a verdict of a jury to that effect, and judgment that the compromise should be set aside. In another action in the Probate Division, for revocation of the probate of the earlier will, the Court held that L. and G. were estopped from denying the forgery (*l*).

Reg. *v.* Brackenridge.

L. was charged with night-poaching under 9 Geo. IV. c. 69, and in course of cross-examination of prosecutor's witnesses the justices considered he had been illegally arrested and discharged him. L. was again summoned for the same offence, upon the same facts, when the justices held that they had no jurisdiction, as the former charge was *res judicata*, and in this decision they were upheld (*m*).

Hall *v.* West End Co.

The plaintiff, mortgagee of a policy of life insurance, handed it to the mortgagor for a particular purpose. On the plaintiff demanding it back from time to time the mortgagor made excuses for not doing so; and the plaintiff then forgot that it had not been returned. Afterwards the mortgagor deposited the policy with the defendants to secure an advance. The plaintiff gave notice of his interest to the insurance company before the defendants. The Court decided that the plaintiff was entitled to the policy as against the defendants, and that the conduct of the plaintiff had not been such as to estop him from asserting his claim against the defendants (*n*).

Low *v.* Bouverie.

In answer to an inquiry addressed by an intending mortgagee to the trustee of a fund, whether the life tenant had encumbered his interest, the trustee enumerated certain specific charges on the life interest. At this date the trustee had received notice of several

(*k*) Brunsden *v.* Humphreys (1884), 14 Q. B. D. 141; 53 L. J. Q. B. 476; and see Miles *v.* McIlwraith (1883), 8 App. Cas. 120; 52 L. J. P. C. 17; and Clarke *v.* Yorke (1882), 52 L. J. Ch. 32; 47 L. T. 381.

(*l*) Priestman *v.* Thomas (1884), 9 P. D. 210; 53 L. J. P. 109; and see Beardsley *v.* Beardsley, [1899] 1 Q. B. 746; 68 L. J. Q. B. 270.

(*m*) Reg. *v.* Brackenridge (1884), 48 J. P. 293; and see The Thyatira (1883), 8 P. D. 155; 52 L. J. P. 85; Ennis *v.* Rochford (1884), 14 L. R. Ir. 285; Cropper *v.* Smith (1885), 10 App. Cas. 249; 55 L. J. Ch. 12; *In re* Ghost's Trusts (1883), 49 L. T. 588; Ryley *v.* Brown (1890), 17 Cox, C. C. 79; 62 L. T. 458.

(*n*) Hall *v.* West End Advance Co. (1883), 1 C. & E. 161.

other incumbrances, but he had forgotten their existence. In an action by the mortgagee against the trustee to recover the loss arising from the insufficiency of the mortgage, it was held that the trustee was not liable in the absence of estoppel, and that his answer did not amount to a positive representation that there were no other incumbrances on the life interest so as to create an estoppel against him (*o*).

Webster *v.* Armstrong.

Where, in an action in a County Court, a defendant has relied upon a cause of action by way of counter-claim, upon which he has obtained a verdict for an amount beyond the jurisdiction of the County Court, and judgment has been entered for the defendant, but no relief has been given in respect of the balance in excess of the plaintiff's claim, the defendant is not estopped from afterwards bringing an action in the High Court upon the same cause of action (*p*).

Hartcup *v.* Bell.

The estoppel which enables a landlord who is mortgagor without the legal estate to sue for rent is mutual, and renders him liable on the covenants in the lease (*q*).

In re Horton.

A marriage settlement contained a recital that B. was "seised of or otherwise well entitled to" certain messuages, the whole deed showing the meaning to be that B. was entitled in one shape or other to the fee simple of all the property therein conveyed. The Court held this a sufficient estoppel as to the part of the property in which at the date of the settlement B. had no interest whatever, but to which her interest accrued subsequently (*r*).

Reg. *v.* Eardley.

Where a divisional Court has decided against an applicant on one application, a divisional Court consisting of other judges will not overrule or review that decision on a second application by him, which, though technically different from the first, raises the identical point again (*s*).

Gandy *v.* Gandy.

Where a litigant has obtained the decision of the Court on the construction of a deed in his favour, he cannot ask the Court in a subsequent action to put an opposite construction on the same deed (*t*).

(*o*) Low *v.* Bouverie, [1891] 3 Ch. 82; 60 L. J. Ch. 594.

(*p*) Webster *v.* Armstrong (1885), 54 L. J. Q. B. 236; 1 C. & E. 471; and see 47 & 48 Vict. c. 61, s. 18; Serrao *v.* Noel (1885), 15 Q. B. D. 549; and see Concha *v.* Concha (1886), 11 App. Cas. 541; 56 L. J. Ch. 257.

(*q*) Hartcup *v.* Bell (1883), 1 C. & E. 19.

(*r*) *In re* Horton, Horton *v.* Perks (1884), 51 L. T. 420; and see Hamill *v.* Murphy (1883), 12 L. R. Ir. 400; Manchester and Oldham Bank *v.* Cook (1883), 49 L. T. 674; Shaw *v.* Port Philip Gold Mining Co. (1884), 13 Q. B. D. 103; 53 L. J. Q. B. 369; Mowatt *v.* Castle Steel and Iron Co. (1886), 34 Ch. D. 58; 55 L. T. 645.

(*s*) Reg. *v.* Eardley (1885), 49 J. P. 551.

(*t*) Gandy *v.* Gandy (1885), 30

Where a person, claiming to be assignee of the reversion, receives rent from the tenant by fraud or misrepresentation, such payment is no evidence of title; but where there is no fraud or misrepresentation, such payment is *primâ facie* evidence of title, and the tenant can only defeat that title by showing that he paid the rent in ignorance of the true state of the title, and that some third person is the real assignee of the reversion and entitled to maintain ejectment (*u*). Carlton *v.* Bowcock.

The above are, as has been already stated, only some of the numerous examples of estoppels of various kinds. The law is said to be "favourable to the utility of the doctrine of estoppel, hostile to its technicality." On the one hand, persons must not be allowed to mislead others with impunity; on the other, every little casual remark must not be tortured into an attempt to mislead. In one of the cases just referred to, Lord Bramwell said, "*Estoppels are odious, and the doctrine should never be applied without a necessity for it.*"

Ch. D. 57; 54 L. J. Ch. 1154; and see Roe *v.* Mutual Loan Fund (1887), 19 Q. B. D. 347; 56 L. J. Q. B. 541; Russell *v.* Waterford and Limerick Railway (1885), 16 L. R. Ir. 314; Houstoun *v.* Marquis of Sligo (1885), 29 Ch. D. 448; 52 L. T. 96.

(*u*) Carlton *v.* Bowcock (1884), 51 L. T. 659; and see Ashby *v.* Day (1886), 54 L. J. Ch. 935; 54 L. T. 408; Herman *v.* Royal Exchange Shipping Co. (1884), 1 C. & E. 413; Reg. *v.* Charnwood Forest Railway (1884), 1 C. & E. 419; Barrow Mutual Ship Insurance Co. *v.* Ashburner (1886), 54 L. J. Q. B. 377; 54 L. T. 58; Yarmouth Exchange Bank *v.* Blethen (1885), 10 App. Cas. 293; 54 L. J. P. C. 27; Thorp *v.* Dakin (1885), 52 L. T. 856; Bishop *v.* Balkis Consolidated Co. (1890), 25 Q. B. D. 512; 59 L. J. Q. B. 565.

APPENDIX.

PRINCIPAL LEGAL MAXIMS.

(1.) Accessorium non ducit, sed sequitur, suum principale.
(*The accessory does not lead, but follows, its principal.*)

(2.) Acta exteriora indicant interiora secreta.
(*Overt acts proclaim a man's intentions and motives.*)

(3.) Actio personalis moritur cum personâ.
(*A personal right of action ceases at death.*)

(4.) Actus Dei nemini facit injuriam.
(*The act of God does injury to no man.*)

(5.) Actus non facit reum, nisi mens sit rea.
(*The act itself does not constitute guilt unless done with a guilty intent.*)

(6.) Allegans contraria non est audiendus.
(*Contrary allegations are not to be heard.*)

(7.) Benigne faciendæ sunt interpretationes propter simplicitatem laicorum, ut res magis valeat quam pereat.
(*Instruments ought to be construed leniently, with allowance made for the ignorance of people who are not lawyers, so that the transaction may be supported, and not rendered nugatory.*)

(8.) Caveat emptor.
(*The buyer must look after himself.*)

(9.) Cessante ratione, cessat lex.
(*When the reason for a law ceases to exist, so also does the law itself.*)

(10.) Constructio legis non facit injuriam.
(*The construction of law does not work any injury.*)

(11.) Consuetudo debet esse certa; nam incerta pro nulla habentur.
(*A custom should be certain, for uncertain things are held as nothing.*)

(12.) Consuetudo ex certâ causâ rationabili usitata privat communem legem.
(*A custom grounded on a certain reasonable cause supersedes the common law.*)

(13.) Contemporanea expositio est optima et fortissima in lege.
(*The best way of getting at the meaning of an instrument is to ascertain when and under what circumstances it was made.*)

(14.) Cuilibet in suâ arte perito credendum est.
(*Every man is an expert in the particular branch of business he is familiar with.*)

(15.) Cujus est solum, ejus est usque ad cœlum et ad inferos.
(*Whose is the land, his is also that which is above and below it.*)

(16.) Delegatus non potest delegare.
(*A person having merely delegated authority cannot himself delegate that authority to another.*)

(17.) De minimis non curat lex.
(*The law does not trouble itself about trifles.*)

(18.) Derivativa potestas non potest esse major primitivâ.
(*The power derived cannot be greater than that from which it is derived.*)

(19.) Domus sua est cuique tutissimum refugium.
(*A man's house is his safest retreat.*)

(20.) Donatio perficitur possessione accipientis.
(*A gift is perfected by the possession thereof by the donee.*)

(21.) Ex antecedentibus et consequentibus fit optima interpretatio.
(*From that which goes before, and from that which follows, is derived the best interpretation.*)

(22.) Ex nudo pacto non oritur actio.
(*In order to ground an action, an agreement must have a consideration.*)

(23.) Expedit reipublicæ ne quis suâ re male utatur.
(*The good of the State requires a man not to injure his own property.*)

(24.) Expressum facit cessare tacitum.
(*When all the terms are expressed, nothing can be implied.*)

(25.) Ex turpi causâ non oritur actio.
(*Immorality will not ground an action.*)

(26.) Falsa demonstratio non nocet.
(*A false description does not vitiate a document.*)

(27.) Fraus est celare fraudem.
(*It is fraud to conceal fraud.*)

(28.) Fraus est odiosa et non præsumenda.
(*Fraud is hateful and not to be presumed.*)

(29.) Id certum est quod certum reddi potest.
(*What can be reduced to a certainty is already a certainty.*)

(30.) Ignorantia facti excusat, ignorantia juris non excusat.
(*A man may be pardoned for mistaking facts, but not for mistaking the law.*)

(31.) In contractis tacite insunt quæ sunt moris et consuetudinis.
(*Persons are presumed to contract with reference to habits and customs.*)

(32.) In jure non remota sed proxima causa spectatur.
(*It is not the remote but the immediate cause that the law looks at.*)

(33.) In pari delicto, potior est conditio possidentis.
(*In equal fault, the condition of the possessor is the stronger.*)

(34.) Interest reipublicæ ut sit finis litium.
(*It is the interest of the State that litigation should cease.*)

(35.) Interpretatio fienda est ut res magis valeat quam pereat.
(*That interpretation is to be made, that the thing may rather stand than fall.*)

(36.) Judicis est jus dicere, non dare.
(*A judge should administer the law as he finds it, not make it.*)

(37.) Leges posteriores priores contrarias abrogant.
(*Later laws abrogate prior contrary laws.*)

(38.) Lex non cogit ad impossibilia.
(*The law never urges to impossibilities.*)

(39.) Lex semper intendit quod convenit rationi.
(*The law must be taken to intend what is reasonable.*)

(40.) Lex spectat naturæ ordinem.
(*The law takes into account the natural succession of things.*)

(41.) Melior est conditio possidentis et rei quam actoris.
(*The condition of the possessor is the better; and that of the defendant than that of the plaintiff.*)

(42.) Melior est conditio possidentis, ubi neuter jus habet.
(*The condition of the possessor is the better, where neither of the two has a right.*)

(43.) Modus et conventio vincunt legem.
(*Persons may contract themselves out of their legal liabilities.*)

(44.) Nemo dat qui non habet.
(*No one can give what is not his.*)

(45.) Nemo debet bis vexari, si constat curiæ quod sit pro unâ et eâdem causâ.
(*No one ought to be proceeded against twice, if it be proved to the Court that it be for one and the same cause.*)

(46.) Nemo tenetur seipsum accusare.
(*No one is bound to criminate himself.*)

(47.) Nihil quod est contra rationem est licitum.
(*Nothing is permitted which is contrary to reason.*)

(48.) Nihil quod inconveniens est, licitum est.
(*Nothing which is inconvenient is lawful.*)

(49.) Non dat qui non habet.
(*A man cannot give what he has not got.*)

(50.) Non decipitur qui sit se decipi.
(*A person is not deceived who knows himself to be deceived.*)

(51.) Non omnium quæ a majoribus constituta sunt ratio reddi potest.
(*A reason cannot be given for everything that our ancestors were pleased to ordain.*)

(52.) Noscitur à sociis.
(*The meaning of a word or phrase may be ascertained by reference to those associated with it.*)

(53.) Nullum simile est idem nisi quatuor pedibus currit.
(*Similarity is not analogy unless it runs on all fours.*)

(54.) Nullum tempus aut locus occurrit regi.
(*No time runs against, or place affects, the King.*)

(55.) Nullus commodum capere potest de injuriâ suâ propriâ.
(*No one can take advantage of his own wrong.*)

(56.) Omne majus continet in se minus.
(*The greater includes the less.*)

(57.) Omnia præsumuntur contra spoliatorem.
(*Every presumption is made against one who spoils.*)

(58.) Omnia præsumuntur rite et sollenniter esse acta.
(*It is presumed that all the usual formalities have been complied with.*)

(59.) Omnis ratihabitio retrotrahitur et mandato priori æquiparatur.
(*A ratification is taken back and made equivalent to a previous command.*)

(60.) Optima est lex quæ minimum relinquit arbitrio judicis, optimus judex qui minimum sibi.
(*The best system of law is that which leaves the least to the discretion of the judge; the best judge is he who leaves the least to his own discretion.*)

(61.) Optimus legis interpres est consuetudo.
(*Custom is the best interpreter of law.*)

(62.) Partus sequitur ventrem.
(*The offspring follows the dam.*)

(63.) Potior est conditio possidentis.
(*There is a great advantage in being in possession.*)

(64.) Quælibet concessio fortissimè contra donatorem interpretando est.
(*Every grant is to be most strongly taken against the grantor.*)

(65.) Quam longum debet esse rationabile tempus, non definitur in lege, sed pendet ex discretione justiciariorum.
(*How long* "reasonable time" *ought to be, is not defined by law, but depends upon the discretion of the judges.*)

(66.) Quando aliquid prohibetur ex directo, prohibetur et per obliquum.
(*When anything is prohibited directly, it is also prohibited indirectly.*)

(67.) Quando lex aliquid alicui concedit, concedere videtur id sine quo res ipsa esse non potest.
(*When the law gives anything to anyone, it gives also all those things without which the thing itself would be unavailable.*)

(68.) Qui facit per alium, facit per se.
(*He who does a thing by another does it himself.*)

(69.) Qui hæret in literâ hæret in cortice.
(*He who harps on the mere letter of a written instrument does not get at the pith of the matter.*)

(70.) Qui non improbat, approbat.
(*Not blaming is equivalent to praising.*)

(71.) Qui peccat ebrius, luat sobrius.
(*Let him who sins when drunk, be punished when sober.*)

(72.) Qui prior est tempore, potior est jure.
(*The law favours the earlier in point of time.*)

(73.) Qui sentit commodum, sentire debet et onus.
(*Benefit and burden ought to go hand in hand.*)

(74.) Quicquid plantatur solo, solo cedit.
(*Whatever is planted in the ground becomes part of the ground.*)

(75.) Quicquid solvitur, solvitur secundum modum solventis: quicquid recipitur, recipitur secundum modum recipientis.
(*Whatever is paid, is paid according to the intention of the party paying: whatever is received, is received according to the intention of the party receiving.*)

(76.) Quilibet potest renunciare juri pro se introducto.
(*A man may waive a right established for his own benefit.*)

(77.) Quod ab initio non valet, in tractu temporis non convalescit.
(*Time will not cure what is wrong from the beginning.*)

(78.) Quod constat curiæ opere testium non indiget.
(*It is not necessary to prove those things of which the court takes judicial notice.*)

(79.) Quod fieri non debet factum valet.
(*What ought never to have been done at all, if it* HAS *been done, may be valid.*)

(80.) Quod necessitas cogit, defendit.
(*What necessity compels, it justifies.*)

(81.) Quod subintelligitur, non deest.
(*What is to be understood, is as good as if it were there.*)

(82.) Quod vanum et inutile est, lex non requirit.
(*The law does not require what is vain and useless.*)

(83.) Quoties in verbis nulla est ambiguitas, ibi nulla expositio contra verba fienda est.
(*When the language of a written instrument is perfectly plain, no construction will be made to contradict the language.*)

(84.) Res inter alios acta alteri nocere non debet.
(*A man ought not to be prejudiced by what has taken place between others.*)

(85.) Res judicata pro veritate accipitur.
(*The decision of a court of justice is assumed to be correct.*)

(86.) Respondeat superior.
(*A man must answer for his dependents.*)

(87.) Rex non potest peccare.
(*The King can do no wrong.*)

(88.) Rex nunquam moritur.
(*The King never dies.*)

(89.) Salus populi suprema lex.
(*The welfare of the State is the highest law.*)

(90.) Semper præsumitur pro legitimatione puerorum.
(*It is always to be presumed that children are legitimate.*)

(91.) Sic utere tuo ut alienum non lædas.
(*Make such a use of your own property as not to injure your neighbour's.*)

(92.) Simplex commendatio non obligat.
(*Mere praise creates no liability.*)

(93.) Solvitur secundum modum solventis.
(*Payment is to be made as the payer pleases.*)

(94.) Spondes peritiam artis.
(*If your position implies skill, you must use it.*)

(95.) Ubi jus, ibi remedium.
(*Where there is a right, there is a remedy.*)

(96.) Verba chartarum fortius accipiuntur contra proferentem.
(*The language of an instrument is to be taken strongly against the person whose language it is.*)

(97.) Verba generalia restringuntur ad habilitatem rei vel personæ.

(*General words are to be tied down and interpreted according to their context.*)

(98.) Vigilantibus non dormientibus jura subveniunt.

(*To get the law's help a man must not go to sleep over his own interests.*)

(99.) Vir et uxor consentur in lege una persona.

(*Husband and wife are considered one person in law.*)

(100.) Volenti non fit injuria.

(*The man who is the author of his own hurt has no right to complain.*)

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